No. 910

In the Supreme Court of the United States

OCTOBER TERM, 1941

A. B. KIRSCHBAUM COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Summary of argument	10
Argument	14
I. Petitioner's employees are engaged "in the production of goods for commerce" within the meaning of Sections 6 and 7 of the Act	14
A. The applicability of Sections 6 and 7 depends solely upon the nature of the employee's activities	18
1. The statutory language	18
2. The legislative history	24
3. The decisions	30
B. Even under the "employer test" the employees here involved would be entitled to the benefits of Sections 6 and 7	34
C. The activities of maintenance employees such as those here involved constitute processes or occupations necessary to production within the meaning of Section 3 (j)	36
II. Petitioner's freight elevator operators are also "engaged in commerce" within the meaning of Sections 6 and 7	48
III. Petitioner's employees are not engaged in a "retail or service establishment" within the meaning of Section 13 (a) (2) of the Act	51
IV. The Act, as applied to the employees here involved, constitutes a valid exercise of the commerce power	57
Conclusion	63

CITATIONS

Cases:	
Abadie v. *Cudahy Packing Co. of Louisiana*, 37 F. Supp. 164	32, 41
Abroe v. *Lindsay Bros. Co.*, 4 Wage Hour Rept. 38, affirmed, 300 N. W. 456	43
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	22, 41
Associated Press v. *National Labor Relations Board*, 301 U. S. 103	47

455418—42——1

Cases—Continued. Page

Atkocus v. *Terker*, 30 N. Y. S. (2d) 628 ..... 31, 47
Baggett v. *Henry Fischer Packing Co.*, 37 F. Supp. 670 33
Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission*, 221 U. S. 612 35
Baltimore & O. S. W. R. R. v. *Burich*, 263 U. S. 540 49
Beatty v. *Foutz Tool Co.*, 5 Wage Hour Rept. 259 ..... 31, 56
Berger v. *Clouser*, 36 F. Supp. 168 43
Binderup v. *Pathe Exchange*, 263 U. S. 291 49
Bowie v. *Gonsales*, 117 F. (2d) 11, 123 F. (2d) 387 ..... 42, 43, 59
Bowman v. *Pace Co.*, 119 F. (2d) 858 ..... 33, 41
Boyd v. *Dowell, Inc.*, decided February 28, 1941 31
Brotherhood of Railroad Shop Crafts v. *Lowden*, 86 F. (2d) 458 47
Brown v. *Bailey*, 4 Wage Hour Rept. 108 41
Brown v. *Carter Drilling Co.*, 38 F. Supp. 489 41
Campbell v. *Superior Decalcominia Co.*, 31 F. Supp. 663 42
Carlton v. *London Mines*, 4 Wage Hour Rept. 561 41
Cecil v. *Gradison*, 4 Wage Hour Rept. 698 ..... 32, 41
Collins v. *Kidd*, 38 F. Supp. 634 56
Collum v. *Stevens*, 5 Wage Hour Rept. 304 56
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197 ..... 13, 15, 58, 60, 62
Crompton v. *Baker*, 220 N. C. 52, 16 S. E. (2d) 471 43
Daniel Ball, The, 10 Wall. 557 49
David v. *Boylan's Private Police*, 34 F. Supp. 555 ..... 33, 41
Dollar v. *Caddo River Lumber Co.*, 4 Wage Hour Rept. 521 42
Doyle v. *Johnson Bros.*, 176 Misc. 656, 28 N. Y. S. (2d) 452 ..... 42, 43
Drake v. *Hirsch*, 40 F. Supp. 290 47
Duncan v. *Montgomery Ward & Co.*, 42 F. Supp. 879 56
Eddings v. *Southern Dairies*, 5 Wage Hour Rept. 87 47
Erie R. R. Co. v. *Shuart*, 250 U. S. 465 49
Farr v. *Smith Detective Agency & Night Watch Service*, 38 F. Supp. 105 ..... 32, 41
Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349 30
Federal Trade Commission v. *Pacific States Paper Assn.*, 273 U. S. 52 49
Fleming v. *Alterman*, 38 F. Supp. 94 47
Fleming v. *American Stores Co.*, 42 F. Supp. 511 ..... 31, 47, 56
Fleming v. *Arsenal Building Corp.*, 125 F. (2d) 278, pending on writ of certiorari, No. 924, present Term 31, 42, 60, 62
Fleming v. *Atlantic Co.*, 40 F. Supp. 654 ..... 43, 47
Fleming v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 47
Fleming v. *Hamlet Ice Co.*, 4 Wage Hour Rept. 518, affirmed April 13, 1942 43

Cases—Continued.

	Page
Fleming v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52	55
Fleming v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255	56
Fleming v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 300	42
Fleming v. *Swift & Co.*, 41 F. Supp. 825	42, 43
Fleming v. *Tidewater Optical Co.*, 35 F. Supp. 1015	56
Flores v. *Baetjer*, 4 Wage Hour Rept. 471	42
Gavril v. *Kraft Cheese Co.*, 4 Wage Hour Rept. 682	50
Gerdert v. *Certified Poultry & Egg Co.*, 38 F. Supp. 964	32
Gonzalez v. *Central Monserrate*, decided August 23, 1941	43
Gordon v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980	33
Gregg Cartage & Storage Co. v. *United States*, No. 555, present Term, decided April 13, 1942	55, 56
Hamlet Ice Co. v. *Fleming*, decided April 13, 1942	42, 50
Hanson v. *Queensboro Farm Products, Inc.*, 5 Wage Hour Rept. 255	43
Hargrave v. *Mid-Continent Petroleum Corp.*, 42 F. Supp. 908, affirmed, 5 Wage Hour Rept. 275	42
Harrison v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434, affirmed, 5 Wage Hour Rept. 241	50
Hart v. *Gregory*, 4 Wage Hour Rept. 605	41
Houston & Texas Ry. v. *United States*, 234 U. S. 342	30, 35
Ikola v. *Snoqualmie Falls Lumber Co.*, 4 Wage Hour Rept. 470, reversed 121 P. (2d) 369	44
Jacobs v. *Coppersmith & Sons*, decided Feb. 10, 1940	42
Jax Beer Co. v. *Redfern*, 124 F. (2d) 172	31
Jewel Tea Co. v. *Williams*, 118 F. (2d) 202	32
Johnson v. *Phillips-Buttorff Mfg. Co.*, 5 Wage Hour Rept. 112	43
Killingbeck v. *Garment Center Capitol, Inc.*, 259 N. Y. App. Div. 691, leave to appeal to Court of Appeals denied, 259 N. Y. App. Div. 1076	33, 45
LaRue v. *S. H. Robinson & Co.*, decided February 14, 1941 affirmed sub nom. *S. H. Robinson & Co.* v. *LaRue*, 156 S. W. (2d) 359, 156 S. W. (2d) 432	42, 47
Lefevers v. *General Export Iron & Metal Co.*, 36 F. Supp. 838	42
Magann v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742	50
McMillan v. *Wilson & Co.*, 4 Wage Hour Rept. 409, affirmed, 5 Wage Hour Rept. 188	42
Merryfield v. *F. M. Hoyt Shoe Corp.*, 41 F. Supp. 794	32, 41, 45
Mid-Continent Pipe Line Co. v. *Hargrave*, 5 Wage Hour Rept. 275	42, 48, 49, 50
Milam v. *Texas Spring & Wheel Co.*, 157 S. W. (2d) 653	43
Mill v. *U. S. Credit Bureau*, 5 Wage Hour Rept. 114	56
Mingee v. *Dixie Greyhound Lines*, decided May 16, 1941	47
Minnesota Rate Cases, The, 230 U. S. 352	35

Cases—Continued. Page

Missell v. *Overnight Motor Transp. Co.*, 5 Wage Hour Rept. 25, pending on writ of certiorari, No. 939, present Term.. 47
Monk v. *Continental Baking Co.*, 5 Wage Hour Rept. 205.. 44
Mortenson v. *Western Light & Telephone Co.*, 42 F. Supp. 319..... 44
Muldowney v. *Seaberg Elevator Co.*, 39 F. Supp. 275..... 43, 56
National Labor Relations Board v. *Fainblatt*, 306 U. S. 601.. 30, 32, 35
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1..... 58
National Labor Relations Board v. *Mackay Co.*, 304 U. S. 333..... 47
National Labor Relations Board v. *Sunshine Mining Co.*, 110 F. (2d) 780, certiorari denied, 312 U. S. 678..... 62
Niehaus v. *Greenspon's Sons Pipeline Co.*, decided July 11, 1941..... 42, 43
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294..... 39
Overstreet v. *North Shore Corp.*, 4 Wage Hour Rept. 628..... 41
Owin v. *Liquid Carbonic Corp.*, 5 Wage Hour Rept. 69..... 44, 47
Pedersen v. *Delaware, Lackawanna & W. R. R.*, 229 U. S. 146..... 50
Pedersen v. *Fitzgerald Construction Co.*, 173 Misc. 188, 18 N. Y. S. (2d) 920, affirmed, 262 App. Div. 665, 30 N. Y. S. (2d) 989..... 32, 41
Philadelphia, B. & W. R. R. Co. v. *Smith*, 250 U. S. 101..... 46
Pruett v. *Carruthers & Son Lumber Co.*, 5 Wage Hour Rept. 192..... 43
Puget Sound Co. v. *Tax Commission*, 302 U. S. 90..... 49, 62
Reck v. *Zarnocay*, 4 Wage Hour Rept. 305..... 31, 43, 47
Reeves v. *Howard County Refining Co.*, 33 F. Supp. 90..... 42
Robinson v. *Massachusetts Mutual Life Ins. Co.*, 4 Wage Hour Rept., 725..... 32, 41
Rogers v. *Glazer*, 32 F. Supp. 990..... 41, 45
Santa Cruz Co. v. *National Labor Relations Board*, 303 U. S. 453..... 13, 15, 35, 38, 58, 62
Snyder v. *Casale, Inc.*, 5 Wage Hour Rept. 222..... 31
Southern Pac. Co. v. *Gallagher*, 306 U. S. 167..... 50
Southern Railway Co. v. *United States*, 222 U. S. 20..... 35
Spinner v. *Waterways Fuel & Dock Co.*, 5 Wage Hour Rept. 137..... 43
Steger v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411.. 47
Stiles v. *Emmons*, 5 Wage Hour Rept. 189..... 31
Stucker v. *Roselle*, 37 F. Supp. 864..... 56
Super-Cold Southwest Co. v. *McBride*, 124 F. (2d) 90..... 56
Swift & Co. v. *Wilkerson*, 124 F. (2d) 176..... 31
Sybert v. *Bradley*, 4 Wage Hour Rept., 630..... 41
Texas & N. O. R. R. Co. v. *Railway Clerks*, 281 U. S. 548.. 47, 62
Thompson v. *Daugherty*, 40 F. Supp. 279..... 50

Cases—Continued. Page

Travis v. *Ray*, 41 F. Supp. 6 50
Union Stock Yard Co. v. *United States*, 308 U. S. 213 49
United States v. *American Trucking Assns.*, 310 U. S. 534 ..... 39, 40
United States v. *Darby Lumber Co.*, 312 U. S. 100 ..... 29, 35, 57, 61
United States v. *Dickerson*, 310 U. S. 554 22
United States v. *Dickson*, 15 Pet. 141 55
Virginia Electric Power Co. v. *National Labor Relations Board*, 115 F. (2d) 414, Nos. 25, 26, this Term, decided December 22, 1941 62
Virginian Ry. v. *System Federation No. 40*, 300 U. S. 515 ..... 47, 58, 62
Warren-Bradshaw Drilling Co. v. *Hall*, 124 F. (2d) 42 ..... 31, 38
White Motor Co. v. *Littleton*, 124 F. (2d) 92 58
Wilkinson v. *Noland Co.*, 40 F. Supp. 1009 ..... 43, 47
Williams v. *General Mills*, 39 F. Supp. 849 43
Williams v. *Jacksonville Terminal Co.*, 35 F. Supp. 267, affirmed, 118 F. (2d) 324, affirmed No. 112, present Term, decided March 2, 1942 50
Womack v. *Consolidated Timber Co.*, 5 Wage Hour Rept. 10 ..... 44, 56
Wood v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 ..... 31, 42, 43, 56

Constitution and Statutes:

Constitution, Fifth Amendment 9
Constitution, Tenth Amendment 9, 57
Fair Labor Standards Act of 1938, 52 Stat. 1060 (29 U. S. C. § 201 *et seq.*):
Sec. 2 ..... 17, 19, 20, 58
Sec. 3 ..... 2, 9, 10, 13, 14, 15, 17, 22, 34, 36, 37, 38, 45
Sec. 5 ..... 19, 20, 21, 22
Sec. 6 ..... 2, 3, 4, 9, 10, 14, 15, 17, 18, 19, 20, 21, 23, 24, 32, 34, 39, 55
Sec. 7 ..... 2, 3, 4, 9, 10, 14, 15, 17, 18, 19, 20, 23, 24, 32, 34, 39, 54, 55
Sec. 8 ..... 19, 20, 22
Sec. 11 ..... 19, 22, 23
Sec. 13 ..... 2, 3, 9, 11, 12, 19, 37, 45, 51, 52, 53, 54, 55, 56

Miscellaneous:

81 Cong. Rec. 7957 25
82 Cong. Rec. 1580, 1835 25
83 Cong. Rec.:
pages 7436–7438 52
pages 7449–7450 25
pages 9164–9171 28
pages 9172, 9173 30
pages 9178, 9266–9267 25
86 Cong. Rec. 5268, 5457 40
H. Doc. No. 255, 75th Cong., 1st Sess., p. 3. "President's Message to the Congress, May 24, 1937" 25, 29
H. Rep. No. 1452, 75th Cong., 1st Sess 25

Miscellaneous—Continued.

	Page
H. Rep. No. 2182, 75th Cong., 3d Sess.	25, 30
H. Rep. No. 2738, 75th Cong., 3d Sess.	25, 27, 52
H. R. 5435 and 7133, 76th Cong., 3d Sess.	40
H. R. 7200, 75th Cong., 1st Sess., May 24, 1937, Sec. 2 (a) (24)	15
Interpretative Bulletin No. 1, November 1938	35, 39, 40
Interpretative Bulletins Nos. 5 and 6	40, 54, 55
Joint Hearings before the Senate Committee on Education and Labor, and the House Committee on Labor, on S. 2475 and H. R. 7200 (75th Cong., 1st Sess.), pp. 1–14, 19, 35–37	30, 52
S. 2475, 75th Cong., 1st Sess., May 24, 1937:	
Sec. 2	15
S. 2475, as passed by the House on May 24, 1938:	
Sec. 4	26
Sec. 5	26
Sec. 6	52
Sec. 11	51
S. 2475, as passed by the Senate on July 31, 1937:	
Sec. 1 (a)	26
Sec. 2 (a)	51
Sec. 4 (a)	26
Sec. 7	26
S. Rep. No. 884, 75th Cong., 1st Sess.	25

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 910

A. B. KIRSCHBAUM COMPANY, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 175–180) is reported in 38 F. Supp. 204. The opinion of the Circuit Court of Appeals (R. 213–222) is reported in 124 F. (2d) 567.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 17, 1941 (R. 223). The petition for writ of certiorari was filed January 29, 1942, and granted March 2, 1942. The jurisdic-

tion of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Petitioner's employees covered by the injunction below are engaged in activities necessary to the operation and maintenance of a loft building in which large quantities of goods are produced for interstate commerce. The primary question presented is whether these employees are "engaged in * * * the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act because they are engaged in a "process or occupation necessary to the production" within the meaning of Section 3 (j) of the Act.

2. Two of the employees are freight elevator operators who transport goods arriving from other states or consigned to destinations in other states to and from the various lofts in the building. Are such employees also "engaged in commerce" within the meaning of Sections 6 and 7 of the Act?

3. Are the employees here involved "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of Section 13 (a) (2), which exempts such employees from Sections 6 and 7?

4. Does the Fair Labor Standards Act, as applied to the employees here involved, constitute a valid exercise of the commerce power?

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, 52 Stat. 1060 (29 U. S. C. § 201 *et seq.*). Copies of the Act will be furnished to the Court upon the oral argument.

STATEMENT

On April 19, 1940, the Administrator filed in the District Court an amended complaint against petitioner alleging that petitioner owned and operated a loft building devoted to the manufacture of goods for interstate commerce and that certain of petitioner's employees, by reason of the relationship of their work to the manufacturing activities conducted in the building, were "engaged in commerce or in the production of goods for commerce" within the meaning of the Act.[1] Charging that such employees had not been paid the minimum wages prescribed by Section 6 or the overtime compensation required by Section 7, the amended complaint sought an injunction to re-

[1] The complaint did not allege violations with respect to the superintendent of the building because he falls within the exemption of executive employees provided by Section 13 (a) (1). Other employees such as rental and collection agents were not deemed to be engaged in commerce or production for commerce.

strain further violations (R. 3–7). In its answer petitioner admitted that it had not complied with Sections 6 and 7 but denied that any of its employees were subject to the Act or that the Act could constitutionally be applied to them (R. 8–14).

The facts, as found by the District Court, are not in dispute.[2] Petitioner owns and operates a six-story building in Philadelphia, Pennsylvania (R. 168; 8). The entire building was formerly occupied by petitioner as a factory devoted to the production of men's clothing. For some time prior to the filing of the complaint, however, it was operated as a "loft building" occupied by manufacturers producing large quantities of men's suits and coats, uniforms, pants, boys' wash suits, sweaters, bathing suits, and other types of garments (R. 168–169; 8–9, 82, 107, 135, 144, 155, 160). Seventy to eighty-five percent of the semi-finished and finished goods produced in the building are shipped out of the state (R. 169; 84, 109, 139, 147, 158).[3] The manufacturers also receive

---

[2] The district court adopted Nos. 1 to 16 of the Administrator's proposed findings of fact (R. 180), and the Circuit Court of Appeals sustained the findings against petitioner's limited exception (R. 183, 213–214, 219–220). The findings are printed at pages 168–172 of the record. In the following statement the references preceding the semicolons are to the findings, and the succeeding references are to the supporting evidence or to admissions in the pleadings.

[3] The volume is large: the gross sales of three of the seven manufacturers total $2,000,000 per annum (R. 139, 151, 161). This figure reflects only the value of finished products

large quantities of raw materials and of semi-finished and finished goods from outside of Pennsylvania (R. 169; 84, 111, 139, 157). The delivery of incoming goods and materials and the shipment of outgoing products constitute a constant daily interstate flow (R. 169; 86, 119, 135, 138–139, 148, 159).

Petitioner employs one engineer, three firemen, three elevator operators, two watchmen, a porter, a carpenter, and a carpenter's helper (R. 169; 73). The engineer and firemen perform duties necessary to supply "exhaust" steam for heating the building; without such heat the manufacturers could not continue operation during the winter months (R. 169–170; 28–31, 33, 67, 113, 139, 150, 161; 89, 113, 140, 150, 161). They also produce "live" steam which is used directly in the manufacturing processes; some 140 pressing machines used in production for commerce by six of the manufacturers could not operate if the "live" steam supply were to fail (R. 170; 24, 25, 66–67, 74, 86, 107, 123–124, 137, 157). A steady supply of "live" steam is also essential to the sponging and shrinking operations carried on in two of the shops (R. 170; 26, 67, 75, 156); the

shipped and does not include the further shipment of semi-finished goods from the manufacturers to intermediate processors in other states or back to the manufacturers from the processors. These three manufacturers employ some 500 employees at an annual pay roll of more than $550,000 (R. 140–141, 150–151, 161).

manufacture of the garments could not be completed if the pressing and sponging machines were to cease functioning (R. 170; 75, 87, 107, 124, 137, 156).* The steam is also used to generate direct current electricity which not only lights the common portions of the building, such as halls and stairs, and the premises of two manufacturers, but also furnishes the motive power for 45 sewing machines which cannot operate on the alternating current available from the local utility company. (R. 170; 27–28, 34, 67, 77, 136, 140). Finally, the steam supplied by the engineer and firemen serves to keep the freight and passenger elevators running; if the pressure is permitted to fall below 50 pounds, the elevators will not work (R. 170; 28, 67, 76).

One elevator operator runs the passenger elevator, which carries employees, buyers, salesmen, visitors, and customers to and from the various manufacturing plants in the building (R. 171; 45,

---

* Not only a continued supply of steam, but also a particular quality of steam is necessary to the manufacturing processes. The steam must be "live" steam and must be "dry" in order to be suitable for the processing operations; failure of the firemen to maintain the steam pressure at a minimum of 80 pounds would result in "wet" steam, useless to production (R. 69, 74). The availability of high-pressure steam of the proper quality was a factor which influenced most of the manufacturers to move their plants to petitioner's building (R. 124–125, 137, 145, 149–150).

101). The freight elevators, run by the other two operators, transport from the street level to the various lofts materials arriving from points in other states; they also transport from the lofts to the street level goods consigned to extra-state destinations (R. 171; 85, 135). While in the elevators, the goods are in the custody of the railroads, express companies, motor carriers or steamship lines which have been employed to transport the goods on their interstate journeys (R. 171; 37, 39, 57, 83–85, 108, 109, 120, 129, 135, 138, 148, 149, 158, 159). This interstate movement into and out of the building takes place daily in large volume (R. 171; 38, 149, 159). The amount, weight, and size of the shipments carried on the elevators are impressive. For example, J. B. Haber, Incorporated, receives yarn in 300-pound cases and ships finished garments in packages weighing 250 to 300 pounds (R. 107, 111). Men's clothing manufacturers receive 300 to 400 semi-finished suits at a time (R. 121) and send out several hundred in a single shipment (R. 122). Deliveries and shipments are made in cartons, bales, packing cases, wooden crates, and racks weighing as much as 1,000 pounds (R. 37, 55, 123, 159). Their size and weight make it impossible to carry them on the stairways (R. 58, 84). In the absence of elevator service, deliveries and shipments could not be made and the manufacturers would

be unable to continue production (R. 171; 88, 100, 123, 127, 149).[5]

The two watchmen employed by petitioner keep delivery and pick-up trucks moving in the street and guard the premises of the tenants from loss by fire or theft or from other sources; on their hourly rounds of the manufacturing plants they watch for prowlers, close windows, look for and control leaks in radiators, machinery, and sprinklers, and watch out for fires (R. 172; 42, 51–52, 64, 65). Each morning the watchmen turn on the heat in the boiler room and the steam valves on each floor so that steam will be available when manufacturing starts (R. 172; 53).[6] The porter, carpenter, and carpenter's helper clean, repair, and maintain the halls, stairways, and other common portions of the building which are utilized by the manufacturers, thus preventing the building from becoming filthy or rundown (R. 172; 44, 78–79).

Most of petitioner's employees perform substantially the same duties as they did while petitioner itself was conducting manufacturing operations in the building (R. 172; 40, 66, 192–194).

---

[5] It is also the duty of the elevator operators to remove trash, refuse, and waste materials placed outside their premises by the manufacturers; otherwise the elevator entrances would be blocked and the movement of goods into and out of the manufacturing plants impeded (R. 171; 58–62).

[6] If petitioner did not supply watchman service, the manufacturers would have to engage watchmen of their own (R. 103, 161).

Upon the basis of the foregoing evidence, the District Court concluded that all of the employees covered by the complaint are engaged in the "production of goods for commerce" within the meaning of Sections 6, 7, and 3 (j) of the Act; that the freight elevator operators are also "engaged in commerce" within the meaning of Sections 6 and 7; that petitioner had violated those sections; that petitioner's employees were not engaged in a "service establishment" within the meaning of Section 13 (a) (2); and that the Act as applied to petitioner's employees offends neither the Fifth nor the Tenth Amendments (R. 174–175, 180). On April 28, 1941, the court entered judgment directing the issuance of an injunction as prayed for in the complaint (R. 181–182).

The Circuit Court of Appeals held that the application of Sections 6 and 7, by their terms, turned upon the nature of the employee's activities and not upon the general character of the employer's business (R. 214–217); that as so construed the Act constituted a valid exercise of the commerce power (R. 217–218); that all of the employees covered by the complaint were engaged in production for commerce as defined in the Act since they were engaged in occupations necessary to such production (R. 218–220); that the elevator operators were also directly engaged "in commerce" (R. 219); and that petitioner's enterprise was not a "service establishment" within the

meaning of Section 13 (a) (2) (R. 220–221). The judgment of the district court was accordingly affirmed (R. 223).

SUMMARY OF ARGUMENT

I

The minimum-wage and maximum-hour requirements of Sections 6 and 7 of the Act extend to any employee "who is engaged in commerce or in the production of goods for commerce." Section 3 (j) provides that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any process or occupation necessary to the production, in any State." Under these provisions, the nature of the particular employee's activities plainly determines the coverage of the Act. And since the activities of the employees here involved are clearly necessary to the extensive production for commerce carried on in petitioner's building, coverage is established.

A. Petitioner's contention that the employer, as well as the employee, must be engaged in commerce or in production for commerce is untenable in view of the unambiguous language of Sections 6, 7, and 3 (j). The other sections upon which petitioner relies are not the ones operative here and, in any event, they do not support the inference which petitioner seeks to draw from them. Further, the legislative history reveals that Congress had before

it both the "employer test" and the "employee test" and deliberately chose the latter as the vehicle for achievement of its stated objectives.

B. In any event where, as here, the employees themselves are engaged in production for commerce within the meaning of the Act, the "employer test" suggested by petitioner imposes no additional limitation not already imposed by the "employee test" required by the statute. In its capacity as the employer of particular employees, petitioner is engaged in production for commerce to precisely the same extent as its employees are so engaged.

C. There is nothing to support petitioner's suggested limitation that no employee can be engaged in a "process or occupation necessary to the production" unless he has physical contact with the goods or the materials going into them. The limitation is not warranted by the statute as written, renders the exemptive provision of Section 13 (a) (1) superfluous, and is discredited by the subsequent legislative history of the Act.

II

Petitioner's elevator operators are also "engaged in commerce" within the meaning of Sections 6 and 7. The interstate flow of goods from and into petitioner's building begins and ends at the manufacturer's premises, where the carriers receive and deliver them. The transportation by elevator is a part of the interstate journey and the employees

who operate the elevators are necessarily "in commerce."

III

Petitioner's employees are not exempt as employees "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" (Section 13 (a) (2)). The legislative history demonstrates that this exemption was intended to apply to employees engaged in establishments which cater to the needs of the ultimate consumer; this is shown, too, by the conjunction in the statute of "retail or service" establishments.

Petitioner's business has none of the characteristics connoted by the term "service establishment." If the building is an "establishment" at all, it is a "manufacturing establishment." The typical "service establishment" renders services as its sole or principal function and resembles closely, in respects relevant to the reasons for the exemption, the retail store with which it is grouped in Section 13 (a) (2).

Petitioner's interpretation of the "service establishment" exemption to cover all enterprises providing facilities rather than manufacturing or selling merchandise, renders meaningless specific exemptions which the Act provides for a number of such enterprises. The burden is on petitioner to prove its right to the exemption; it has failed to show that it is within either the language or the policy of Section 13 (a) (2).

IV

As applied to the employees here involved, the Act constitutes a valid exercise of the commerce power. When the activities of employees are "necessary to the production" (Section 3 (j)) they likewise bear the requisite "close" or "direct" relation to commerce. Such activities may be "in relation to productive industry" (*Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 463–464) and need not be a part of the manufacture itself. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197.

The Fair Labor Standards Act, insofar as it seeks to protect commerce against the injurious effects of industrial strife, finds direct precedent in the validity of the National Labor Relations Act when applied to employees such as those here involved. And the Act is equally valid in so far as it seeks to protect commerce from substandard competition; since the activities of petitioner's employees are necessary to the production of goods, those goods would move in commerce as the result of substandard wages and hours if the Act were not applicable. If the employees were employed by the manufacturers they would be clearly within the scope of federal regulation; petitioner's particular arrangement for discharge of the same necessary duties by persons in its employ does not afford insulation against the commerce power.

ARGUMENT

I

PETITIONER'S EMPLOYEES ARE ENGAGED "IN THE PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE MEANING OF SECTIONS 6 AND 7 OF THE ACT

Section 6 of the Act provides that "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * *." Section 7 provides that "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *" for more than a specified number of hours per week, unless "time and a half" is paid for the extra hours. Section 3 (j) reads as follows:

> "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Under these statutory provisions, it is plain that the applicability of the wage and hour provisions of the Act to any particular employee

depends solely upon whether or not that employee is "engaged in commerce or in the production of goods for commerce." And whether an employee is engaged in "production of goods for commerce" depends in turn upon whether he is engaged in any of the activities enumerated in Section 3 (j), including "any process or occupation necessary to the production * * * *." The statute does not attempt to enumerate what processes or occupations are "necessary to the production"; that question is rather left to be determined upon the facts of individual cases as they arise. Cf. *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466–468; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 222.[7]

In the present case, the requisite necessary relation of the employees' activities to the production of goods for commerce carried on in petitioner's

[7] That Congress intended to introduce an element of flexibility, permitting application of Sections 6 and 7 to turn upon the degree to which an employee's activities are "necessary", is shown by the legislative history of Section 3 (j). In earlier drafts of the bill introduced in the Senate, the clause "or in any process or occupation necessary to the production thereof, in any State" did not appear; instead there appeared a very specific clause: "or in the making of tools and dies used in the production of such goods in any State." S. 2475, 75th Cong., 1st Sess., May 24, 1937, Sec. 2 (*a*) (24). The corresponding provision of the bill introduced in the House was identical except that it did not contain the phrase "in any State." H. R. 7200, 75th Cong., 1st Sess., May 24, 1937, Sec. 2 (a) (24).

building is, we believe, clearly established. The evidence reviewed in the Statement (*supra*, pp. 4–8) shows that if the employees ceased to discharge their duties, or discharged them inefficiently, heat, steam and electricity directly necessary to continuance of the productive processes would fail, freight and passenger elevator service indispensable to the functioning of the manufacturing plants would not be available, essential precautionary measures against loss from fire, theft, and other sources would not be taken, and the building would become filthy and fall into disrepair, with readily apparent effects upon the manufacturing activities.

This is not merely a remote or speculative relationship. For upon the record in this case it is perfectly plain that a stoppage of work by the employees here involved would mean that the production, sale and shipment of goods by the manufacturers in the building could not continue. The effect of such a stoppage upon commerce would thus be quite as direct and quite as complete as though the manufacturers' own employees, engaged directly in manufacturing processes, were to cease work. The Government introduced evidence into the record concerning the strike of maintenance employees in New York City during February 1939, which graphically demonstrates the effect upon production of a cessation of work on the part of such employees. The strike resulted from a dis-

pute over wages and hours (R. 196, 208). Cf. Section 2 of the Act. Although it lasted but three days, production in the buildings affected came to a virtual halt (R. 196, 197) and interstate transportation into and out of the buildings was adversely affected (R. 201–207). Stoppage of elevator service prevented manufacturers and their employees from reaching the plants and the lack of "live" steam stopped processing operations (R. 197, 200). Incoming goods remained undelivered; outgoing goods could not be shipped (R. 197, 201). The virtual cessation of production also had a direct effect upon production by contractors in other states (R. 198–199).

It is thus clear, we believe, that the activities of employees such as those here involved are "necessary to the production" of goods for commerce within any normal usage of those words; indeed, petitioner scarcely denies this fact. Rather, petitioner seeks to change in two respects the test of applicability which Sections 6, 7 and 3 (j) in terms require. First, it contends that the employer, as well as the employee, must be "engaged in commerce or in the production of goods for commerce" in order for Sections 6 and 7 to apply (Brief, 11). Second, it apparently contends that no employee can be engaged in a "process or occupation necessary to the production" within the meaning of Section 3 (j) unless he has physical contact with the goods or with the materials going into them (Brief, 52, 54). Neither

contention, we submit, finds any support in the language of the statute or in its legislative history. Further, acceptance of the first contention would not advance petitioner's case, since, as we show below (pp. 34–36), an employer is engaged in commerce or in the production of goods for commerce to the same extent as his employees are so engaged.

A. THE APPLICABILITY OF SECTIONS 6 AND 7 DEPENDS SOLELY UPON THE NATURE OF THE EMPLOYEE'S ACTIVITIES

Petitioner's contention that the applicability of Sections 6 and 7 does not turn upon the nature of the employee's activities is far from clear. While petitioner at times seems to propose a dual test of coverage, under which the employer and the employee must each be engaged in commerce or production for commerce (Brief, 11, 44, 49), it also strongly suggests that the employer must, in addition, be a member of what petitioner says "may be termed an interstate industry" (Brief, 17, 26). Whatever the scope of the contention may be, however, it must be rejected as in direct contravention of the terms of the Act and of its legislative history, which make clear that Congress intended the relation of the employee's activities, and not of the employer's business, to interstate commerce to be decisive.

1. *The statutory language.*—Section 6 unambiguously requires the payment of not less than prescribed minimum wages by "every employer" to "each of his employees who is engaged in com-

merce or in the production of goods for commerce." Under Section 7, "no employer" may work "any of his employees," so engaged, in excess of the statutory workweek without paying the required overtime compensation. The terms "every," "each," "no," and "any" preclude the qualifications which petitioner would insert. And Section 3 (j) unequivocally defines "produced" in terms of what the employee does; it provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed" in the enumerated activities.*

Petitioner draws its proposed additional requirement that the employer satisfy the criteria stated with reference to the employee, namely that he be engaged in commerce or production for commerce, from Sections 2, 5, 8, and 11 of the Act. It would take an exceedingly clear inference from these sections to justify engrafting an addition upon the unambiguous language of Sections 6 and 7. And the fact is that the sections upon which petitioner relies in no way justify the inference drawn, as both courts below held (R. 178, 217).

---

*The exemptive provisions of the Act emphasize that Congress was careful to distinguish between instances in which the nature of the employee's work, and those in which the character of the employer's business, was determinative. Section 13 (a) enumerates eleven exemptions from the wage and hour requirements. Subdivisions 1, 3, 5, and 6 turn upon the activities of the employee; subdivisions 2, 4, and 9 depend upon the nature of the employer's enterprise.

In Section 2, the preamble of the Act, Congress spoke in terms of "industries engaged in commerce or in the production of goods for commerce." It is apparent, and Congress doubtlessly contemplated, that the mass of the employees covered by the "employee test" stated in Sections 6 and 7 would be engaged in industries manufacturing goods for shipment in interstate commerce. But this fact certainly does not warrant an assumption that Sections 6 and 7 were intended to be limited to such industries, contrary to the express language which Congress deliberately chose to use in those sections. In any case, the inference which petitioner seeks to draw from the preamble is effectively negatived by the title of the Act: "An act to provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes."

The language of Sections 5 and 8 providing for the formation of industry committees for "each industry engaged in commerce or in the production of goods for commerce," and for the recommendation by such committees of minimum wages to be paid "by employers engaged in commerce or in the production of goods for commerce in such industry" affords no firmer ground for petitioner's contention. On the contrary, these sections show that if Congress had intended Sections 6 and 7 to be similarly limited, the language was ready at hand. The particular means chosen by Congress for acceleration of the 40 cent minimum

wage provided in Section 6 cannot operate to alter the substantive content of Section 6 itself. The nature of the problem presented by the desire of Congress to accelerate the 40 cent minimum wage without unduly disrupting the economy of the nation makes it readily understandable why acceleration was provided on an industry basis. Indeed, it would seem that the only administratively practicable choice which Congress had was to proceed either on a sectional or an industry basis. The fact that, for purposes unrelated to the coverage of the Act as set forth in Section 6, Congress chose to proceed on an industry basis cannot be taken as evidence of an intention to limit the clear language of Section 6.

The correctness of our view, that such an intention may not be inferred is indicated by the fact that in the case of Puerto Rico and the Virgin Islands, where the geographical area covered was sufficiently small and the conditions sufficiently homogeneous to permit wage adjustment by area rather than by industry, the Administrator was given power to appoint a "special industry committee" to set a minimum wage applicable "to all employees * * * engaged in commerce or in the production of goods for commerce * * *" (Section 5 (e), added by amendment of June 26, 1940, 54 Stat. 615 (29 U. S. C. Sec. 205 (e)). In other words, where the nature of the subject matter dealt with did not make desirable a departure from the "employee test" used in Sec-

tions 6 and 7, Congress also maintained that test for the wage adjustment procedure.[9]

Petitioner's final reliance is upon Section 11 (a) and 11 (c). Section 11 (a) authorizes the Administrator to "investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act * * *." This authorization was plainly in aid of the acceleration mechanism provided by Sections 5 and 8, and the procedures appropriate to investigation for purposes of gathering information indicated the advisability of an industry approach.[10] But to obviate all doubt, Section 11 (a) also authorized the Administrator to—

> enter and inspect such places and such records (and make such transcriptions

---

[9] Petitioner advances (Brief, note 7, p. 23) two arguments against ascribing any weight to Section 5 (e): first, that with regard to territories Congress is not subject to the same limitations upon the commerce power as exist with regard to the several states; and, second, that an amendment two years after passage of the Act cannot shed light upon the original legislative intent. The first contention ignores the fact that, however plenary the power of Congress over territories, it expressly placed territories in the same position as states for purposes of the Fair Labor Standards Act. Section 3 (c). The second contention contravenes settled principles of statutory construction. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 487–489; *United States* v. *Dickerson*, 310 U. S. 554, 562. Petitioner does not attempt to rebut the cogent presumption that Congress intended Section 5 (e) to fit logically and without conflict into the text of the Act as it stood prior to amendment.

[10] The manifest intent was to enable the Administrator to obtain a complete picture of conditions in an "interstate

> thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. * * *

It is only by disregarding this portion of Section 11 (a) that petitioner (Brief, 25–27) has made the section appear to proceed entirely on an industry basis; actually, it is broad enough to permit investigation whenever there is reason to believe that any employee engaged in commerce or production for commerce has not received the benefits of Sections 6 or 7.

Section 11 (c) (Brief, 27–28) merely provides that "every employer subject to any provision of this Act" shall keep and preserve pay-roll records in such form as the Administrator may prescribe by regulation. This language manifestly proves nothing with respect to the point at issue. If Sections 6 and 7 mean what they say and apply to "each" and "any" employee who is engaged in commerce or production for commerce, then the employer of each such employee must comply with Section

---

industry" in order to promulgate a wage order fair to all in that industry. Accordingly, the authorization was sufficiently broad to permit investigation of the labor standards observed by employers in an industry who were not producing for commerce so as to permit an informed appraisal of what accelerated minimum wage employers in the industry who were producing for commerce could pay without being placed in an unfair competitive position.

11 (c) with respect to the work records of such employee. The language plainly cannot be distorted to read that only "employers engaged in commerce or production for commerce" are required to keep appropriate records."

In sum, petitioner would read Section 6 to state that "every employer *engaged in commerce or in the production of goods for commerce* shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates. * * *."[12] A corresponding limitation is read into the provisions of Section 7. There is nothing in the plan or language of the statute as a whole which in any way justifies this distortion of the unambiguous words which Congress actually used.

2. *The legislative history.*—The history of the minimum wage and maximum hour provisions of

---

[11] The same observation is applicable to petitioner's paraphrasing of Sections 6 and 7 in the portion of its brief (pp. 3, 4) entitled "Statute Involved." Petitioner's gratuitous insertion of the phrase "every employer covered by the Act" into the terminology of those sections cannot change the meaning: if one, some, or all of his employees are engaged in the activities stated in the sections, the employer is "covered by the Act" insofar as those employees are concerned. See *infra*, pp. 34–36.

[12] Under petitioner's triple test, which is advanced alternately with the double test stated in the text (*supra*, p. 18), Section 6 would read "Every employer *engaged in commerce or in the production of goods for commerce in an industry so engaged* shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * *" (see Brief, pp. 16–17, 26).

the Act as they moved through a somewhat complicated legislative process[13] demonstrates that Congress specifically considered whether the "employee test" or the "employer test" should govern the coverage of those provisions and deliberately resolved the issue in favor of the former. The bill as passed by the House provided for the establishment of wage and hour standards with respect to all employees of "every employer

---

[13] The legislation was initiated by a message from the President dated May 24, 1937 (H. Doc. No. 255, 75th Cong., 1st Sess.). On the same day companion bills were introduced in both houses (S. 2475 and H. R. 7200). In June 1937 joint hearings were held by the Senate Committee on Education and Labor and the House Committee on Labor. On July 8, 1937, the Senate Committee reported S. 2475 (S. Rep. No. 884, 75th Cong., 1st Sess.) and this bill, with some floor amendments, passed the Senate on July 31, 1937 (81 Cong. Rec. 7957). The House Committee on Labor considered the Senate bill, S. 2475, rather than the House companion bill and reported it on August 6, 1937 (H. Rep. No. 1452, 75th Cong., 1st Sess.). On December 15, 1937, the House Committee substituted another draft (82 Cong. Rec. 1580) in place of the bill previously reported. On December 17, 1937, this substitute bill was recommitted by the House to the House Committee on Labor (S. 2475, December 17, 1937, 75th Cong., 2d Sess.; 82 Cong Rec. 1835). On April 21, 1938, the House Committee on Labor reported still a third draft of S. 2475 (H. Rep. No. 2182, 75th Cong., 3d Sess.). This bill, with some floor amendments, passed the House on May 24, 1938 (83 Cong. Rec. 7449–7450). The Senate and House versions of the bill were then sent to a Joint Conference Committee, which arrived at an agreement on June 11, 1938 (H. Rep. No. 2738, 75th Cong., 3d Sess.). The bill agreed to by the conferees was adopted in both Houses on June 14, 1938 (83 Cong. Rec. 9178, 9266–9267), and the Act was approved by the President on June 25, 1938.

engaged in commerce in any industry affecting commerce"; coverage thus depended exclusively upon the character of the employer's business.[14] But the bill as previously passed by the Senate rested coverage solely upon the nature of the individual employee's activities.[15] This di[illegible] con-

[14] S. 2475, as passed by the House on May 24, 1938. The minimum wage provision (Section 4) stated that "Every employer engaged in commerce in any industry affecting commerce shall * * * pay each employee employed by him * * *"; the maximum hour provision (Section 5 (a)) stated that "No employer engaged in commerce in any industry affecting commerce shall employ any of his employees * * * *."

[15] S. 2475, as passed by the Senate on July 31, 1937. Section 7 made it unlawful for "any person, directly or indirectly * * * to employ under any substandard labor conditions any employee engaged in interstate commerce or in the production of goods intended for transportation or sale" in such commerce. In an effort to establish that the bill passed by the Senate did not adopt the "employee test," petitioner invokes the references, in the whereas clauses of Section 4 (a), to wage and hour conditions obtaining in "interstate industries" (Brief, 31). As in the case of the Act as it now stands, such recitations cannot serve to deny effect to the clear terms of the operative provisions (*supra*, p. 20). Further, petitioner insists (Brief, 18) that since Section 1 (a) of the bill as passed by the Senate recited substandard labor conditions in "occupations" in commerce or production for commerce, the subsequent omission of that term from the Act evidences a shift from the "employee test" to the "employer test." Petitioner thus argues in both directions with respect to the Senate bill. Efforts to follow petitioner's reasoning are further impeded by the fact that the bill passed by the House, which petitioner concedes turned exclusively upon the "employer test" (Brief, 26), likewise used "occupations" in its preamble. S. 2475, as passed by the House on May 24, 1938, Sec. 2 (a). The confusion into which petitioner's various arguments resolve when placed

flict, along with others, was resolved in conference. The unanimous conference report recommending passage of the revised bill shows that the conferees were fully aware of the conflict, which they resolved in favor of the Senate version. The conference report states:

> Section 6 of the conference agreement provides for the establishment of minimum wages for employees engaged in commerce or in the production of goods for commerce. The House amendment provided for the establishment of minimum wages if the employer was engaged in commerce in any industry affecting commerce. * * *
>
> Section 7 of the conference agreement provides for the establishment of maximum hours of employment for employees engaged in commerce or the production of goods for commerce. The House amendment provided for the establishment of maximum hours of employment if the employer was engaged in commerce in an industry affecting commerce.[16]

---

side by side pointedly illustrates the danger of ascribing a meticulous and discriminating delimitation of coverage to general terms used in preambles while concurrently implying a loose use of precise language in the operative provisions.

[16] H. Rep. 2738, 75th Cong., 3d Sess., pp. 29, 30. The statement of Senator Pepper (Pet. Brief, 35) during debate on the conference agreement contains nothing inconsistent with the conclusion, clear from the face of the agreement and the bill which accompanied it, that the conferees deliberately rejected the "employer test" in favor of the "employee test." Petitioner's quotations (Brief, 33–34) from statements con-

Petitioner asserts that the conference agreement narrowed the coverage under the "employer test" of the House bill and, consequently, that anything beyond the scope of that bill is also beyond the scope of the Act. The basis of the contention is that the conference agreement "rejected the theory of coverage based upon activity 'affecting commerce'" (Brief, 56). The fact of the matter, however, is that since the House bill applied to "every employer engaged in commerce in any industry affecting commerce" (note 14, p. 26, *supra*), no appropriate place remained for the phrase "affecting commerce" when the conferees dropped the industry test and adopted the employee's activities as the test of coverage. "Affecting commerce" had never appeared in any draft as a term describing or modifying the employee's activities; its deletion, therefore, cannot imply a restriction of coverage based on the relation of those activities to commerce.

The phrase "affecting commerce" is not, as petitioner seems to suggest, the only means whereby a Congressional intention to exercise the commerce power to its constitutional limits may be expressed. Some subjects of regulation appropriately call for the use of "affecting commerce" to express such an

---

cerning the conference agreement by Senators Thomas, Borah, and Bailey establish only that the debate revolved about the extent of Congressional power, not the comparative merits of the "employer test" and the "employee test." See 83 Cong. Rec. 9164–9171.

intention."[17] But where, as here, Congress was dealing with the production of goods for interstate commerce, "affecting commerce" had no proper place. The phrase could not be used to modify either "production" or the activities of employees in connection with production. Congress was concerned with assuring that the production of goods passing in commerce met certain modest labor standards (*United States* v. *Darby Lumber Co.*, 312 U. S. 100, 113–115); in the words of the President, the purpose of the Fair Labor Standards Act was to insure that "only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce." *President's Message to the Congress, May 24, 1937,* H. Doc. No. 255, 75th Cong., 1st Sess., p. 3. To obtain the widest possible achievement of that purpose, Congress defined "commerce" and "produced" in the most sweeping terms (Sections 3 (b), (j)). The breadth of those definitions, the purpose of the Act, and its legislative history, all preclude any contention that with respect to activities in connection with production for commerce, the focal point of the statute, there

[17] Thus under the National Labor Relations Act Congress attempted to protect commerce from the burdening and obstructive effects of labor disputes caused by unfair labor practices; the particular segment of industry in which these recognized sources of strife occurred was not deemed significant so long as the strife would "affect commerce" by stopping or materially decreasing the interstate movement of goods.

is not evidenced an "intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce." *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607.[18] The Congressional debates were cast in terms of the extent of constitutional power to regulate wages and hours in view of apparently conflicting decisions of this Court; the premise that the proposed legislation reached the limits of that power was assumed. See, e. g., 83 Cong. Rec. 9166 *et seq.*; *Joint Hearings before the Senate Committee on Education and Labor, and the House Committee on Labor, on S. 2475 and H. R. 7200* (75th Cong., 1st sess.) pp. 1–14, 19.[19]

3. *The decisions.*—In addition to the court below, the Second and Fifth Circuits, the only Circuit Courts of Appeals to pass on the question, have

---

[18] The sole possible exception to this statement concerns regulation of production for exclusively intrastate sale and consumption of goods which compete with goods brought into the State in interstate commerce. Cf. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349; *Houston & Texas Ry.* v. *United States* (*Shreveport Case*), 234 U. S. 342. This is not a true exception since such production is not "for commerce" within the meaning of the Act. A provision specifically extending the bill to such activity (S. 2475, 75th Cong., 2d Sess., as recommitted Dec. 17, 1937, Sec. 8 (a)) was dropped from an intermediate draft by the House Committee (S. 2475, 75th Cong., 3d Sess., as reported April 21, 1938; H. Rep. 2182).

[19] Senator Borah was of the opinion that a newspaper which shipped only 20 or 30 copies outside of the state was subject to the proposed statute (83 Cong. Rec. 9172). And Senator Wagner stated that the scope of the bill was as broad as that of the National Labor Relations Act (83 Cong. Rec. 9173).

adhered to the "employee test." *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278 (C. C. A. 2), pending on writ of certiorari, No. 924, present Term; *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42 (C. C. A. 5); cf. *Jax Beer Co.* v. *Redfern*, 124 F. (2d) 172, 174 (C. C. A. 5); *Swift & Co.* v. *Wilkerson*, 124 F. (2d) 176, 177 (C. C. A. 5). Eight decisions of other courts are in accord,[20] although, notwithstanding the clear wording of Sections 6 and 7, a conflict exists in the district and state courts.

Cases cited by petitioner (Brief, 44–48, 65) contrary to the Government's position were all decided prior to both the decision below and that of the Second Circuit in the *Arsenal Building* case. Two

---

[20] *Snyder* v. *Casale, Inc.*, 5 Wage Hour Rept. 222 (S. D. N. Y.) (employees repairing and maintaining trucks leased by employer to companies producing goods for commerce); *Beatty* v. *Foutz Tool Co.*, 5 Wage Hour Rept. 259 (S. D. Cal.) (employees of machine shop engaged in repairing oil drilling equipment used in production for commerce); *Boyd* v. *Dowell, Inc.*, decided February 28, 1941 (D. C. Lea Co., N. Mex.) (employees chemically treating low-production oil wells owned and drilled by persons other than the employer); *Stiles* v. *Emmons*, 5 Wage Hour Rept. 189 (Ct. Comm. Pl. Ohio) (employees of contract motor carrier transporting within state scrap paper from storage plants to factories of independent paper manufacturers producing for commerce); *Atkocus* v. *Terker*, 30 N. Y. S. (2d) 628 (Mun. Ct.) (watchman of independent contractor repairing bridge over navigable waters of United States). See also *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 46 (W. D. Tenn.); *Fleming* v. *American Stores Co.*, 42 F. Supp. 511, 522 (E. D. Pa.); *Reck* v. *Zarnocay*, 4 Wage Hour Rept. 305 (Sup. Ct. N. Y.), pending on appeal to Appellate Division, 1st Department.

gave almost decisive weight to the omission of the words "affecting commerce" from Sections 6 and 7 (*supra*, pp. 28–30).[21] Four others involved no question of "production for commerce" but contain language to the effect that the "employer test" is appropriate under Sections 6 and 7.[22] Two cases involved only the question whether employees of a wholesaler who were engaged in the intrastate distribution of goods received by their employer from outside the state were "in commerce."[23] Two were dismissed because the employee brought suit

---

[21] *Merryfield* v. *F. M. Hoyt Shoe Corp.*, 41 F. Supp. 794 (D. N. H.), pending on appeal to the First Circuit; *Robinson* v. *Massachusetts Mutual Life Ins. Co.*, 4 Wage Hour Rept. 725 (Sup. Ct. Tenn.).

[22] In *Cecil* v. *Gradison*, 4 Wage Hour Rept. 698 (Ct. App. Ohio) and *Farr* v. *Smith Detective Agency & Night Watch Service*, 38 F. Supp. 105 (N. D. Tex), the office buildings watched or maintained by the plaintiff employees were not devoted to production. The same is true of the *Robinson* case, *supra*, note 21. In *Pedersen* v. *Fitzgerald Construction Co.*, 173 Misc. 188, 18 N. Y. S. (2d) 920 (Sup. Ct.), affirmed without opinion, 262 App. Div. 665, 30 N. Y. S. (2d) 989 (3d Dept.), now pending on appeal to the Court of Appeals the employee was engaged in repairing a bridge; no "production" was involved. In *Abadie* v. *Cudahy Packing Co. of Louisiana*, 37 F. Supp. 164 (E. D. La.) four-fifths of one percent of the goods manufactured in the plant were shipped in commerce; by application of the *de minimis* rule (cf. *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607), the court determined that there was no production for commerce in which the plaintiff employee could have been engaged.

[23] *Jewel Tea Co.* v. *Williams*, 118 F. (2d) 202 (C. C. A. 10); *Gerdert* v. *Certified Poultry & Egg Co.*, 38 F. Supp. 964 (S. D. Fla.).

against someone other than his employer.[24] One of the cases adopts the "employee test" if it can be said to subscribe to either.[25] The remaining decision, denying recovery on facts very similar to those present here, seems to have been influenced by the court's view that "a portion" of the loft building had "perhaps fortuitously, been rented to tenants engaged in interstate commerce." *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 N. Y. App. Div. 691, 693 (1st Dept.), leave to appeal to the New York Court of Appeals denied, 259 N. Y. App. Div. 1076.[26]

---

[24] In *Bowman* v. *Pace Co.*, 119 F. (2d) 858 (C. C. A. 5), an employee of a watchman's agency company named as the sole defendant the manufacturer whose plant he guarded. The court held that the plaintiff could sue only his employer, stating that "if the employment as watchman comes under the Act, Forsyth [Detective Service] owes him the minimum wage, for he is Bowman's employer" (p. 860). In *David* v. *Boylan's Private Police*, 34 F. Supp. 555 (E. D. La.), the watchman joined both the detective agency and the manufacturer as defendants; a motion to dismiss was granted as to the manufacturer and trial of the case against the agency was ordered.

[25] *Baggett* v. *Henry Fischer Packing Co.*, 37 F. Supp. 670 (W. D. Ky.). The court held that a complaint which failed to allege that the employee was engaged in commerce or in production therefor was defective even though it alleged that the employer was so engaged. See *Gordon* v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980, 986 (W. D. Ky.).

[26] In the present case production for commerce was carried on in the building when petitioner occupied it as a single factory, and the building has been occupied almost entirely by garment manufacturers producing for a national market ever since petitioner abandoned manufacturing operations and divided the building into lofts.

B. EVEN UNDER THE "EMPLOYER TEST" THE EMPLOYEES HERE INVOLVED WOULD BE ENTITLED TO THE BENEFITS OF SECTIONS 6 AND 7

Even if the wording of Sections 6 and 7 and the legislative history of those sections did not conclusively rebut petitioner's view that they turn upon the employer's activities in addition to those of his employees, the latter would nevertheless be entitled to the benefits of the Act. For where employees are "'engaged in commerce or in the production of goods for commerce", it necessarily follows that the employer is likewise so engaged; accordingly, the "employer test" does not in fact impose any additional limitation not already imposed by the "employee test."

Any contention that an employer is not engaged in commerce or production therefor, although some of his employees are so engaged, must proceed upon a contradiction in terms. When petitioner's firemen, in the course of their employment, supply steam necessary to the manufacturing operations carried on in the building, petitioner is supplying such steam as a part of its business; if the firemen, by virtue of their connection with the production, are "engaged in production" as defined in Section 3 (j), petitioner is necessarily so engaged.

Nor may this simple proposition be obscured by terming petitioner "a mere landlord" or by implying that it cannot be engaged in production for commerce because its primary business con-

sists, not of supplying steam or otherwise facilitating productive processes, but of renting space to tenants. In this regard petitioner is in no different position from a manufacturer who produces principally for intrastate sale and consumption and only to a comparatively minor extent for interstate commerce; so long as the goods shipped out of the state constitute "more than that to which courts would apply the maxim *de minimis*" (*National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607), such a manufacturer is engaged in production for commerce and is subject to the Act with reference to all of his employees whose activities are necessary to such production."

In other words, the so-called employer test cannot be applied to an employer in the abstract. The activities of the particular employee to whom the Act is alleged to apply necessarily frame the issue; it is in its capacity as the employer of such

---

" The business of such a manufacturer might be arranged in one of two ways. The production for commerce might be confined to a few of the workers, with the bulk of the employees engaged exclusively in intrastate production; under the "employee test" the Act would apply only to the few. Interpretative Bulletin No. 1, pars. 3, 5 (November 1938). But if all the employees worked indiscriminately on all of the goods produced, all would be covered. Cf. *United States* v. *Darby Lumber Co.*, 312 U. S. 100; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 619; *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453; *Houston & Texas Ry.* v. *United States* (*Shreveport case*), 234 U. S. 342; *The Minnesota Rate Cases*, 230 U. S. 352, 399; *Southern Railway Co.* v. *United States*, 222 U. S. 20.

an employee that petitioner must resist application of the statute. As the employer of renting agents, collectors, and others whose processes or occupations are not necessary to production, petitioner is engaged in no production of any kind, interstate or intrastate. But in its capacity as the employer of the employees involved in this case, petitioner is engaged in production for commerce to precisely the same extent that they are so engaged.

C. THE ACTIVITIES OF MAINTENANCE EMPLOYEES SUCH AS THOSE HERE INVOLVED CONSTITUTE PROCESSES OR OCCUPATIONS NECESSARY TO PRODUCTION WITHIN THE MEANING OF SECTION 3 (j)

Petitioner argues that the phrase "any process or occupation necessary to the production" (Section 3 (j)) should be interpreted to include only activities "devoted to the physical production of tangible goods," "processes integrally related to the physical production of goods," and services which "directly function in the production of goods" (Br. 52, 55). These alleged criteria are not defined other than by the statement that they may perhaps include some employees "who do not come in physical contact with the goods" (Br. 54). If the suggested tests are intended as anything more than a paraphrase of the general language of the statute itself, however, they must be taken as meaning that the statute should be construed to include only activities involving either physical contact with the goods during their production or with the materials going into the goods. But activities in-

volving such physical contact are covered by the preceding clauses of Section 3 (j): "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods * * *." It is apparent that this part of the statutory definition was intended to encompass all employees who perform operations on or otherwise handle goods; the additional clause "or in any process or occupation necessary to the production" includes other activities related to the production.

The arbitrary limitation which petitioner apparently seeks to impose upon the word "necessary" would also render Section 13 (a) (1) of the Act supererogatory and thereby ascribe redundance where none otherwise exists. That section exempts from the operation of Sections 6 and 7 executive, administrative, and professional employees. Since such employees customarily do not have physical contact with the goods or materials, in petitioner's view they are not covered even in the absence of the exemption.

Petitioner's limitation upon the types of occupations which are covered by Section 3 (j), whether or not the excluded types are "necessary to the production" by any pragmatic standard, flies in the face of an apparent legislative intention to import realistic scope into the coverage provision. Congress deliberately substituted the phrase "or in any process or occupation necessary to the production" for the specific and

inflexible phrase, which had appeared in earlier drafts of the bill, "or in the making of tools and dies used in the production" (note 7, p. 15, *supra*). The obvious purpose of this substitution was considerably to broaden the coverage of the Act by permitting the courts, in the light of the facts of particular cases, to determine which activities are "necessary" to production. Cf. *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466–468. Had Congress intended to incorporate into Section 3 (j) any such hard and fast rule as petitioner suggests, it would certainly not have chosen the words which it used to accomplish its objective.

Further, the apparent intention to include the activities of tool and die workers within the last clause of Section 3 (j) demonstrates that Congress deemed the Act applicable to employees performing necessary processes preparatory to production, although they do not have physical contact with the goods at any stage of the production.[25] But if "non-contact" employees whose activities are necessary to the inception of production are covered, no reason appears why "non-contact" employees whose services are necessary to the contin-

[25] Compare *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42 (C. C. A. 5), holding the Act applicable to employees in rotary drilling crews whose work ceases before the oil wells are "brought in". And see also petitioner's concession at page 54 of its brief that "perhaps some employees are to be included who do not come in physical contact with the goods".

uance of production should not likewise be covered. Any such distinction is without basis in reason or relevant policy. If tool and die workers are deemed to be engaged in production, employees who supply the heat, light, power, transportation, and other services facilitating production must, by a parity of reasoning, be deemed engaged in production. There is but a single statutory test subsumed in the term "necessary to the production" and the test must be applied to both types of employees in like manner.

Finally, the subsequent legislative history of the Act adds to the difficulties of petitioner's "physical contact" limitation. Within a month after the effective date of the Act, the Administrator advised employers that Sections 6 and 7 were

> not limited merely to employees who are engaged in physical work on the product itself * * *. Therefore the benefits of the statute are extended to such employees as maintenance workers, watchmen, stenographers, messengers, all of whom must be considered as engaged in processes or occupations "necessary to the production" of the goods.[29]

---

[29] Interpretative Bulletin No. 1, par. 5, issued in November 1938. Representing "the contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new," the Administrator's advisory interpretation is entitled to great weight. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549; *Norwegian Nitrogen Co.* v. *United States*, 288

If this early and consistently maintained administrative interpretation, upon which attention was focussed by repeated judicial approval (*infra*, pp. 41–44), had distorted the legislative intent, it might be supposed that Congress would have amended the Act, repeatedly before it for amendment in other respects, so as to repudiate the distortion. To the contrary, however, an amendment proposing to exempt from Section 7 "service, maintenanee, and other workers not engaged directly in the production of goods for commerce" was twice defeated in the House. 86 Cong. Rec. 5268, 5457.[39] The defeat of this proposal imports

---

U. S. 294, 315. In petitioner's view, "where the Administrator interprets the law *not* to apply his opinion is presumptively correct. But where he interprets the law as applicable little or no weight should be given his opinion as such" (Brief, 92). This astonishing admonition is based upon an assertion, unjustified by anything in the Bulletin that the Administrator "resolves all doubts in favor of coverage"; the salutary principle of the *American Trucking Assns.* case is thus restricted, with reference to opinions of the Administrator in favor of coverage, to situations in which no "doubts" exist. In such situations the principle is supererogatory.

For the convenience of the Court, copies of Interpretative Bulletins Nos. 1, 5, and 6 have been filed with the Clerk.

[39] Amendments to H. R. 5435 and 7133, 76th Cong., 3d Sess., offered by Congressman Kitchens on April 30, 1940, and again on May 2, 1940. The fact that the proposed amendment did not attempt to exempt such employees from Section 6 is further indication that Congress deemed them within the scope of the Act. So far as we can determine, there has been no proposal advanced in Congress to exempt such employees from the minimum wage provisions.

Congressional recognition that the Administrator's rejection of the "physical contact" limitation is correct. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488.

Petitioner cites not a single decision which has adopted the "physical contact" distinction.[31] On the other hand, many courts, including the First,

---

[31] The cases cited by petitioner for the proposition that "maintenance and service employees are [not] engaged in the production of goods for commerce" (Brief, note 1, pp. 59–60), do not touch upon the "physical contact" distinction. *Carlton* v. *London Mines*, 4 Wage Hour Rept. 561 (D. C. Colo.) involved a weighmaster at a mine who did handle the goods and *Hart* v. *Gregory*, 4 Wage Hour Rept. 605 (Sup. Ct. N. C.) concerned a watchman who guarded the plant; both courts held that the requisite showing of "necessary to the production" had not been made, but neither referred to "physical contact." The other cases cited are remote from the point. The *Abadie*, *Cecil*, *Robinson*, *Merryfield*, *Farr*, *Bowman*, and *David* cases are discussed at pages 32–33, *supra*. *Overstreet* v. *North Shore Corp.*, 4 Wage Hour Rept. 628 (S. D. Fla.) concerned employees engaged in repairing a toll road; its citation, and that of the *Pedersen* case (*supra* note 22, p. 32) constitute a play on the word "maintenance"; no production for commerce was involved in either case. Such production was likewise absent in *Brown* v. *Carter Drilling Co.*, 38 F. Supp. 489 (S. D. Tex.) (watchman guarding idle oil rig) and *Brown* v. *Bailey*, 4 Wage Hour Rept. 108 (Ct. App. Tenn.) (maintenance employee of wholesaler distributing exclusively within the state). *Rogers* v. *Glazer*, 32 F. Supp. 990 (W. D. Mo.) and *Sybert* v. *Bradley*, 4 Wage Hour Rept. 630 (S. D. Ill.) were decided on the "service establishment" exemption (*infra*, pp. 51–56). Despite the nature of its citations, petitioner purports to achieve an almost even division of authority by eliminating from the cases unfavorable to it "dicta, unreported cases, and memorandum opinions that do not reveal the facts" (Brief, note 1, pp. 59–60).

Second, Fourth, and Tenth Circuits,[32] the only Circuit Courts of Appeals to pass on the question in addition to the court below, have held the Act applicable to a wide variety of employees performing necessary maintenance or clerical functions which did not involve "physical contact" and which differed in no pertinent respect from the activities of the employees here involved. Thus watchmen,[33] firemen,[34] carpenters,[35] electric-

---

[32] *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 123 F. (2d) 387 (C. C. A. 1); *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278 (C. C. A. 2), pending on writ of certiorari, No. 924, present Term; *Hamlet Ice Co.* v. *Fleming*, decided April 13, 1942 (C. C. A. 4); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 5 Wage Hour Rept. 275 (C. C. A. 10).

[33] *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 123 F. (2d) 387 (C. C. A. 1); *Lefevers* v. *General Export Iron & Metal Co.*, 36 F. Supp. 838 (S. D. Tex.); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tenn.); *Jacobs* v. *Coppersmith & Sons*, decided Feb. 10, 1940 (E. D. N. C.); *Campbell* v. *Superior Decalcomiinia Co.*, 31 F. Supp. 663 (N. D. Tex.); *McMillan* v. *Wilson & Co.*, 4 Wage Hour Rept. 409 (Co. Ct. Minn.), affirmed, 5 Wage Hour Rept. 188 (Sup. Ct. Minn.); *Fleming* v. *Pearson Hardwood Flooring Co.*, 39 F. Supp. 309 (E. D. Tenn.); *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90 (N. D. Tex.); *Doyle* v. *Johnson Bros.*, 176 Misc. 656, 28 N. Y. S. (2d) 452 (City Ct.); *Dollar* v. *Cadd & River Lumber Co.*, 4 Wage Hour Rept. 521 (W. D. Ark.); *Flores* v. *Baetjer*, 4 Wage Hour Rept. 471 (D. P. R.); *Niehaus* v. *Greenspon's Sons Pipeline Co.*, decided July 11, 1941 (Co. Ct. Mo.); *LaRue* v. *S. H. Robinson & Co.*, decided February 14, 1941 (Co. Ct. Tenn.), affirmed sub nom., *S. H. Robinson & Co.* v. *LaRue*, 156 S. W. (2d) 359 (Ct. App. Tenn.), affirmed 156 S. W. (2d) 432 (Sup. Ct. Tenn.); *Hargrave* v. *Mid-Continent Petroleum Corp.*, 42 F. Supp. 908 (E. D. Okla.), affirmed, 5 Wage Hour Rept. 275 (C. C. A. 10); *Fleming* v. *Swift & Co.*, 41 F. Supp. 825 (N. D. Ill.),

ians,[34] engineers and mechanics,[35] janitors, porters and handymen,[36] messengers,[37] telephone operators,[38] various types of clerical workers,[39] and

---

pending on appeal to the Seventh Circuit; *Williams* v. *General Mills*, 39 F. Supp. 849 (N. D. Ohio), pending on appeal to the Sixth Circuit; *Fleming* v. *Hamlet Ice Co.*, 4 Wage Hour Rept. 518 (E. D. N. C.), affirmed April 13, 1942 (C. C. A. 4); *Crompton* v. *Baker*, 220 N. C. 52, 16 S. E. (2d) 471; *Gonzalez* v. *Central Monserrate*, decided August 23, 1941 (D. P. R.), pending on appeal to the First Circuit; *Milam* v. *Texas Spring & Wheel Co.*, 157 S. W. (2d) 653 (Civ. App. Tex.); *Hanson* v. *Queensboro Farm Products, Inc.*, 5 Wage Hour Rept. 255 (Sup. Ct. N. Y.); *Johnson* v. *Phillips-Buttorff Mfg. Co.*, 5 Wage Hour Rept. 112 (Ch. Ct. Tenn.); *Berger* v. *Clouser*, 36 F. Supp. 168 (M. D. Pa.); *Pruett* v. *Carruthers & Son Lumber Co.*, 5 Wage Hour Rept. 192 (Ct. App. Tenn.); *Spinner* v. *Waterways Fuel & Dock Co.*, 5 Wage Hour Rept. 137 (Ct. App. Ohio).

[34] *Wood* v. *Central Sand & Gravel Co.*, *Doyle* v. *Johnson Bros.*, *Crompton* v. *Baker*, *Williams* v. *General Mills*, *Fleming* v. *Swift & Co.*, all *supra*.

[35] *Bowie* v. *Gonzalez*, *Fleming* v. *Hamlet Ice Co.*, *Gonzalez* v. *Central Monserrate*, all *supra; Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), pending on appeal to the Fifth Circuit.

[36] *Bowie* v. *Gonzalez*, *Fleming* v. *Atlantic Co.*, *Williams* v. *General Mills*, *Gonzalez* v. *Central Monserrate*, all *supra; Abroe* v. *Lindsay Bros. Co.*, 4 Wage Hour Rept. 38 (Mun. Ct. Minneapolis), affirmed, 300 N. W. 456 (Sup. Ct. Minn.).

[37] *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Fleming* v. *Atlantic Co.*, *Fleming* v. *Swift & Co.*, *Crompton* v. *Baker*, *Abroe* v. *Lindsay Bros. Co.*, *Niehaus* v. *Greenspon's Sons Pipeline Co.*, all *supra*.

[38] *Bowie* v. *Gonzalez*, *supra; Gonzalez* v. *Central Monserrate*, *supra*.

[39] *Bowie* v. *Gonzalez*, *supra*.

[40] *Fleming* v. *Atlantic Co.*, *supra; Wilkinson* v. *Noland Co.*, 40 F. Supp. 1009 (E. D. Va.); *Reck* v. *Zarnocay*, 4 Wage Hour Rept. 305 (Sup. Ct. N. Y.), pending on appeal to Appellate

cookhouse employees [41] have been held to be engaged in "occupations necessary to the production".

Overlapping its "physical contact" limitation is petitioner's distinction between employees "necessary to the enterprise" and those "necessary to the production" (Brief, 50–51, 60). Like the "physical contact" test, this distinction purports to exclude all maintenance workers, including those employed directly by the producer; the argument is, in effect, that employees may be necessary to an essentially productive enterprise and yet not be necessary to the production carried on by it. This distinction is obviously too ephemeral to serve as an aid in construction of the Act. In an attempt to give it content, petitioner suggests that only those employees are "necessary to production" who "directly function" in production (Brief, 55). Yet if this criterion has any meaning, it is limited to those employees who perform the specific activities enumerated in Section 3 (j); thus, it denies all effect to the phrase "in any process or occupation

---

Division, 1st Dept.; *Mortenson* v. *Western Light & Telephone Co.*, 42 F. Supp. 319 (S. D. Iowa); cf. *Owin* v. *Liquid Carbonic Corp.*, 5 Wage Hour Rept. 69 (S. D. Tex.); *Monk* v. *Continental Baking Co.*, 5 Wage Hour Rept. 205 (N. D. Tex.).

[41] *Ikola* v. *Snoqualmie Falls Lumber Co.*, 4 Wage Hour Rept. 470 (Super. Ct. Wash.), reversed on other grounds, 121 P. (2d) 369 (Wash); *Womack* v. *Consolidated Timber Co.*, 5 Wage Hour Rept. 10 (D. Oreg.), pending on appeal to the Ninth Circuit.

necessary to the production" (see *supra*, pp. 36–37). Furthermore, the distinction between "employees necessary to the enterprise" and those "necessary to the production," like the "physical contact" limitation, renders the exemptive provisions of Section 13 (a) (1) superfluous.[42]

Petitioner further suggests that the term "necessary," as used in Section 3 (j), is to be interpreted as equivalent to "indispensable," and that the court below erred in refusing so to rule. The court held that petitioner's elevator operators, engineers, and firemen were covered by the Act because their activities "were so necessary to the production * * * as to be indispensable to

[42] The cases upon which petitioner places heaviest reliance recognized the dependence of the production itself upon the work of maintenance employees but held the Act inapplicable because the producer was not the employer. *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 N. Y. App. Div. 691 (1st Dept.), leave to appeal to the New York Court of Appeals denied, 259 App. Div. 1076; *Merryfield* v. *F. M. Hoyt Shoe Corp.*, 41 F. Supp. 794 (D. N. H.), pending on appeal to the First Circuit. The only authority for the distinction which petitioner suggests is a dictum in *Rogers* v. *Glazer*, 32 F. Supp. 990, 993 (W. D. Mo.).

Petitioner attempts to justify the distinction on the ground that the Administrator deems all employees of an employer producing some goods for commerce to be within the Act (Brief, 50). The Administrator has never taken that position; on the contrary, he has recognized that an employer producing goods both for interstate and intrastate commerce may, by appropriate segregation of employees, insulate from the application of the Act those employees who produce goods exclusively for intrastate commerce. See note 27, p. 35, *supra*.

that production"; it held further that the Act covered the watchmen, carpenters, and porter because their services were "necessary in that they are both convenient and appropriate * * *" (R. 219–220).

Neither the terms of the Act nor its legislative history contains any indication that Congress intended to limit the application of the Act to employees who were indispensable to production. The reasonable interpretation made by the court below finds precedent in this Court's application of the Federal Employers' Liability Act. In *Philadelphia, B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101, the Court held that a mess cook and camp cleaner for a bridge repair gang was engaged "in commerce" within the meaning of that statute although the repair work concededly could have proceeded without the services which he performed. The Court said (pp. 103–104):

> He was employed * * * no doubt with the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had. * * * Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act."

"While the Fair Labor Standards Act does not expressly erect the "necessary" test with respect to employees alleged to be engaged "in commerce" rather than in "production"

In addition to the court below, two other courts have had occasion to consider, and have rejected, the "indispensability" standard which petitioner suggests. *Mid-Continent Pipe Line Co.* v. *Hargrave*, 5 Wage Hour Rept. 275 (C. C. A. 10); *S. H. Robinson & Co.* v. *LaRue*, 156 S. W. (2d) 359, 361

(Sections 6, 7), the courts have properly filled the interstice. *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.), pending on appeal to the Third Circuit; *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.); *Fleming* v. *Alterman*, 38 F. Supp. 94 (N. D. Ga.); *Drake* v. *Hirsch*, 40 F. Supp. 290 (N. D. Ga.); *Owin* v. *Liquid Carbonic Corp.*, 5 Wage Hour Rept. 69 (S. D. Tex.); *Reck* v. *Zarnocay*, 4 Wage Hour Rept. 305 (Sup. Ct. N. Y.), pending on appeal to the Appellate Division, 1st Dept.; *Wilkinson* v. *Noland Co.*, 40 F. Supp. 1009 (E. D. Va.); *Mingee* v. *Dixie Greyhound Lines*, decided May 16, 1941 (W. D. Tenn.), pending on appeal to the Sixth Circuit; *Missel* v. *Overnight Motor Transp. Co.*, 5 Wage Hour Rept. 25 (C. C. A. 4), pending on writ of certiorari, No. 939, present Term; *Eddings* v. *Southern Dairies*, 5 Wage Hour Rept. 87 (E. D. S. C.); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex.); *Atkocus* v. *Terker*, 30 N. Y. S. (2d) 628 (Mun. Ct.); *Fleming* v. *Capital Broadcasting Co.*, 4 Wage Hour Rept. 124 (M. D. Ala.). There is abundant authority for such a construction of the Act in cases construing and applying similar remedial labor legislation. See particularly *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333 (supervisors and clerks of telegraph agency); *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103 (editorial employees of news gathering and distributing agency); *Texas & N. O. R. R. Co.* v. *Railway Clerks*, 281 U. S. 548; *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515; *Brotherhood of Railroad Shop Crafts* v. *Lowden*, 86 F. (2d) 458 (C. C. A. 10) (repairmen, clerks, machinists, boilermakers, blacksmiths, sheet-metal workers, electricians, carmen, and power-plant employees of railroad carriers).

(Ct. App. Tenn.), affirmed, 156 S. W. (2d) 432 (Sup. Ct. Tenn.). There are no contrary decisions.

II

PETITIONER'S FREIGHT ELEVATOR OPERATORS ARE ALSO "ENGAGED IN COMMERCE" WITHIN THE MEANING OF SECTIONS 6 AND 7

The Circuit Court of Appeals held that, in addition to being engaged in production for commerce, petitioner's freight elevator operators

> are also directly engaged in commerce, for although their activities take place entirely within the state they carry out one step in the actual transportation of the goods to points outside the State (R. 219).

This conclusion is plainly correct unless the substantial and continuous interstate flow of goods out of the manufacturing plants can be said to begin at the portals of petitioner's building. But the goods are delivered into the custody and control of the interstate carrier at the manufacturer's loft; the passage from loft to street is the first step in the performance of the carrier's contract for transportation of the goods from the manufacturer to his consignee. The brief halt at the street level for loading onto a truck cannot be said, in any realistic sense, to mark the end of one journey and the beginning of another. Cf. *Mid-Continent Pipe*

Line Co. v. *Hargrave*, 5 Wage-Hour Rept. 275 (C. C. A. 10). Nor does any such result follow simply because part of the transportation is "vertical" and the remainder "horizontal."

It is also clear that the transportation by elevator is part of the interstate journey in the case of incoming goods. The destination of the goods is the manufacturer's loft, not petitioner's unloading platform, and the interstate transportation does not end until the goods reach the destination intended by the shipper. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309; *Federal Trade Commission* v. *Pacific States Paper Assn.*, 273 U. S. 52, 64. Indeed, performance of the carrier's contract for interstate transportation is completed only when delivery is accepted by the consignee, the manufacturer, at his own premises on a certain floor of petitioner's building. Cf. *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 219; *Baltimore & O. S. W. R. R.* v. *Burtch*, 263 U. S. 540; *Erie R. R. Co.* v. *Shuart*, 250 U. S. 465; *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90.[44] Nor does petitioner suggest any point at which the goods may

[44] The incoming and outgoing shipments are sometimes handled by transfer or express companies who have received the goods from, or are to deliver them to, the interstate carrier. This circumstance is immaterial and the shipments so handled differ in no pertinent respect from those received from or delivered to the carrier itself at the manufacturer's premises. Cf. *The Daniel Ball*, 10 Wall. 557, 565.

be said to come to rest before their delivery to the consignee.

The decisions under the Act, pursuant to established principles (see, e. g., *Pedersen* v. *Delaware, Lackawanna & W. R. R.*, 229 U. S. 146, 151), have recognized that the words "engaged in commerce" should not be limited to employees who actually transport goods across state lines.[*] And, unless the Act is to be so limited, it is clear that employees whose activities supply the indispensable initial and terminal links in the extensive interstate transportation moving into and out of petitioner's building are within its scope.

---

[*] *Mid-Continent Pipe Line Co.* v. *Hargrave*, 5 Wage Hour Rept. 275 (C. C. A. 10) (watchman guarding pipe line carrying oil of independent company entirely within state from wells to refinery from which, after processing, the oil moved in commerce); *Thompson* v. *Daugherty*, 40 F. Supp. 279 (D. Md.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742 (W. D. Va.) (truck drivers hauling mail between post office and depot of interstate carrier); *Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434 (W. D. Mo.), affirmed, 5 Wage Hour Rept. 241 (C. C. A. 8); *Williams* v. *Jacksonville Terminal Co.*, 35 F. Supp. 267 (S. D. Fla.), affirmed on other grounds, 118 F. (2d) 324 (C. C. A. 5), affirmed, No. 112, present Term, March 2, 1942 ("red caps"); *Gavril* v. *Kraft Cheese Co.*, 4 Wage Hour Rept. 682 (N. D. Ill.) (truck drivers delivering from branch warehouses to retail stores goods received by the branch warehouse from the main warehouse which in turn received the goods from outside the state); *Hamlet Ice Co.* v. *Fleming*, decided April 13, 1942 (C. C. A. 4) (employees delivering ice within the state to interstate carrier); *Travis* v. *Ray*, 41 F. Supp. 6 (W. D. Ky.) (bus driver carrying passengers to and from depot of interstate carrier); and see cases cited in note 43, pp. 46–47, *supra*. See also *Southern Pac. Co.* v. *Gallagher*, 306 U. S. 167, 179, n. 39.

III

PETITIONER'S EMPLOYEES ARE NOT ENGAGED IN A "RETAIL OR SERVICE ESTABLISHMENT" WITHIN THE MEANING OF SECTION 13 (a) (2) OF THE ACT

Section 13 (a) of the Act provides that

> The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

Petitioner contends that its maintenance employees are engaged in a "service establishment" within the meaning of this exemption. The contention consists of a broad interpretation of the quoted terms as covering all enterprises providing facilities rather than manufacturing or selling merchandise. The Government's position, accepted by the court below (R. 221), is that Section 13 (a) (2) was intended to exempt employees engaged in establishments which cater to the needs of the ultimate consumer, whether such needs be for goods or for services.

The legislative history (see note 13, p. 25, *supra*) indicates that this was the purpose of Section 13 (a) (2). The differing versions of the bill passed by the two houses of Congress agreed in exempting any person employed in a "local retailing capacity."[46] The bill as passed by the House fur-

[46] S. 2475, passed by the Senate July 31, 1937, Sec. 2 (a) (7). S. 2475, passed by the House May 24, 1938, Sec. 11

ther exempted "any retail industry the greater part of whose selling is in intrastate commerce." [47] The Conference Committee extended the exemption to "service" establishments and reported Section 13 (a) (2) in its present form.[48] While neither the report of that Committee nor the debates on the bill it reported to both houses of Congress sheds light on the reason for this addition, it is a rational inference that the Committee desired to make clear that the exemption covered not only the local butcher shop but its neighboring valet establishment as well. Under the bill as passed by the House, which provided for the exemption of retail industries "selling" in intrastate commerce, the status of such service establishments was doubtful.

Had the insertion of the express "service establishment" exemption been intended to have any more far-reaching effect, the pattern of the Conference Committee report (*supra,* note 48) indicates that an explanation would have been forthcoming. And the fact that no one challenged the addition indicates a rather uniform understanding that there was no intent to exempt a new

---

(a) (1). The committee hearings and debates which preceded passage of the bills reflect an acute Congressional concern about applying the Act to the small retailer and similar businesses. See 83 Cong. Rec. 7436-7438; Joint Hearings before the Senate Committee on Education and Labor, and the House Committee on Labor, on S. 2475 and H. R. 7200 (75th Cong., 1st Sess.), pp. 35–37.

[47] S. 2475, passed by the House May 24, 1938, Sec. 6.

[48] H. Rep. No. 2738, 75th Cong., 3d sess., pp. 9, 32.

and wholly unrelated segment of the industrial community.

Petitioner's business partakes of none of the characteristics connoted by the term "service establishment".[49] As the proprietor of a loft building devoted to production, it is not an "establishment" devoted to "servicing"; it rents lofts to manufacturers and supplies employees necessary to successful operation of the enterprises there conducted (see R. 220–221). The neighborhood shoe repair "establishment" renders services as the essence of its existence. In regard to its clientele, location, appearance, personnel, and hours of remaining open, such an establishment closely resembles the "retail * * * establishment" with which it is grouped in Section 13 (a) (2). These two very similar kinds of establishments presented an identical problem in framing the statute and a common solution was reached as to them.[50] Petitioner's enterprise, resembling neither kind of

[49] The term "establishment" is not synonymous with "business" or "enterprise"; it connotes a physical place of business. See Interpretative Bulletin No. 6, pars. 33–43. If petitioner's building may properly be called an "establishment" at all, it would be a "manufacturing establishment" since it is devoted primarily to manufacturing operations.

[50] Aside from problems common to both types of establishments, it is plain that the exemption of one but not the other would have left a rather extensive "twilight zone." For example, the ordinary gasoline service station sells gasoline, oil, and automobile accessories at retail but also repairs and mounts tires and tubes, washes, simonizes, and lubricates automobiles, and otherwise performs numerous tasks that cannot be described as retail "selling."

establishment in any of their distinguishing characteristics, falls outside the scope both of the problem and of its solution.[51]

The breadth which petitioner would ascribe to the term "service establishment" renders meaningless other provisions of the Act. The statute contains express exemptions for small telephone exchanges, suburban or interurban railways, local trolley and bus lines, motor freight carriers, grain elevators, warehouses storing agricultural products, stockyards handling livestock, and establishments engaged in ginning or compressing cotton for farmers.[52] Under petitioner's theory, all of

---

[51] In Interpretative Bulletin No. 6, revised June 1941, par. 24, the Administrator stated that "Typical examples of service establishments akin to retail establishments, within the meaning of the exemption are: Restaurants; cafeterias; roadside diners; hotels; tourist houses; trailer camps; home laundries; barber shops; beauty parlors; public baths; scalp-treatment establishments; masseur establishments; funeral homes; embalming establishments; crematories; establishments engaged in cleaning, dyeing, pressing, altering, and repairing hats, clothing, and household goods for private individuals; valet shops; shoe repair shops; shoeshine parlors; dress-suit rental establishments; public garages; automobile laundries; 'drive it yourself' establishments; battery shops; parking lots; musical instrument repair shops; piano tuning establishments; radio repair shops; watch, clock, and jewelry repair establishments; household refrigerator service and repair shops. These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise."

[52] See Sections 7 (b) (3), 7 (c); 13 (a) (9), (10), (11); 13 (b) (1). Petitioner's suggestion that the exemptions are not mutually exclusive (Brief, 60) affords no answer. For

these express exemptions would be superfluous, since all of the enterprises mentioned would be encompassed within the terms of Section 13 (a) (2). And petitioner's interpretation would deny the benefits of the Act to employees engaged in scores of industries [53] whose only distinction from industries concededly subject to the Act lies in the fact that they do not sell a tangible product.

The familiar principle that a strict construction is to be given to exceptions to a remedial statute of general scope and embodying a broad legislative policy is fully applicable to the Fair Labor Standards Act. *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52, 56 (C. C. A. 8); *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 16 (C. C. A. 1); cf. *United States* v. *Dickson*, 15 Pet. 141, 165; *Gregg Cartage & Storage Co.* v. *United States*, No. 555,

---

example, cotton ginning and compressing enterprises not within the area of production mentioned in Section 13 (a) (10) are, pursuant to Section 7 (c), exempt from the maximum hour provisions of Section 7 (a) but not from the minimum wage provisions of Section 6. But if such enterprises are exempt from both Section 6 and Section 7 (a), as "service establishments" within the meaning of Section 13 (a) (2), the specific exemption from Section 7 (a) granted by Section 7 (c) makes no sense and conflicting legislative intentions result. Compare Section 13 (b) (1).

[53] The industries whose members have claimed the benefit of the "service establishment" exemption, but which were not deemed by the Administrator to be sufficiently similar to retail establishments to be entitled thereto, are enumerated in paragraph 29 of Interpretative Bulletin No. 6, revised June 1941. Typical of such industries are: banks, insurance companies, radio broadcasting stations, stock brokers, and printing and binding and photostat companies.

present Term, decided April 13, 1942. Petitioner has failed to sustain the burden of taking itself out of the sweep of the Act by demonstrating that its enterprise is within either the language or the policy of Section 13 (a) (2).[54]

---

[54] The lower federal courts have rejected the broad interpretation which petitioner advances. See the following cases in which the exemption was held not to apply: *Super-Cold Southwest Co.* v. *McBride*, 124 F. (2d) 90 (C. C. A. 5) (selling and servicing refrigeration units for commercial use in butcher shops, restaurants, etc.); *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.) (fixture repair shops, warehouses, and other nonselling units servicing stores of a chain store system); *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.) (installation, maintenance, and repair of elevators); *Fleming* v. *Tidewater Optical Co.*, 35 F. Supp. 1015 (E. D. Va.) (grinding and polishing lens blanks for optometrists and doctors); *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E. D. Ky.) (tobacco auction warehouse); *Collum* v. *Stevens*, 5 Wage Hour Rept. 304 (N. D. Tex.) (industrial machine and repair shop); *Mill* v. *U. S. Credit Bureau*, 5 Wage Hour Rept. 114 (S. D. Cal.) (commercial collection agency). See also *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 46, 47 (W. D. Tenn.); *Stucker* v. *Roselle*, 37 F. Supp. 864, 867 (W. D. Ky.). Of the cases cited by petitioner (Brief, 65, 69, 70) *White Motor Co.* v. *Littleton*, 124 F. (2d) 92 (C. C. A. 5), *Collins* v. *Kidd*, 38 F. Supp. 634 (E. D. Tex.), and *Duncan* v. *Montgomery Ward & Co.*, 42 F. Supp. 879 (S. D. Tex.) were all based on the "retail * * * establishment" terminology of Section 13 (a) (2) and do not support petitioner's views as to "service establishments." *Womack* v. *Consolidated Timber Co.*, 5 Wage Hour Rept. 10 (D. Ore.), pending on appeal to the Ninth Circuit, involved a restaurant. *Beatty* v. *Foutz Tool Co.*, 5 Wage Hour Rept. 259 (S. D. Cal.), held an industrial machine shop to be a service establishment; it is contrary to *Collum* v. *Stevens*, *supra*.

IV

THE ACT, AS APPLIED TO THE EMPLOYEES HERE INVOLVED, CONSTITUTES A VALID EXERCISE OF THE COMMERCE POWER

Petitioner contends that the Act, if applied to any of the employees included within the injunction, offends against the Tenth Amendment.[55] This Court in *United States* v. *Darby Lumber Co.*, 312 U. S. 100, sustained the Act as a valid exercise of the commerce power; since that decision, however, was limited to the particular activities alleged in the indictment to constitute "production for commerce" (312 U. S. at 117), the constitutional question is not foreclosed to petitioner.

We believe it clear that whenever the activities of any employee satisfy the statutory test that they be "necessary to the production" of goods for interstate commerce, they also meet the constitutional requirement that the intrastate activities regulated have a "substantial effect" upon commerce or bear a "direct" or "close" relation to it. *United States* v. *Darby, supra,* at 119–120. Accordingly, the contentions we have advanced to establish that the employees satisfy the statutory test likewise demon-

[55] The Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States* v. *Darby*, 312 U. S. 100, 124. Our argument is framed, therefore, in terms of whether the regulation of the activities of petitioner's employees is within the delegated power of Congress over interstate commerce.

strate that such activities are within the permissible scope of federal control.

It is familiar doctrine that the commerce power "is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'" *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37. And "the close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry * * *." *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 464. The employees whose work bears the requisite relation to commerce need not be themselves engaged in the manufacture nor need their employer be the producer of the goods for commerce; it is sufficient that the cessation of their labors would have a direct and deleterious effect upon commerce. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; cf. *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515.

The findings of Congress in the National Labor Relations Act that stoppage of productive operations by industrial strife arising from unfair labor practices of employers would result in burdens and obstructions to commerce in the goods produced (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *supra*, at 41) find their counterpart in the Congressional findings upon which the Fair Labor Standards Act is based. Section 2 of

the Act states that the observance by employers of substandard labor conditions "leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce." It is, of course, a matter of common knowledge that strikes and lock-outs spring as well from wage and hour issues as from interference by employers with the self-organization and collective bargaining of employees, and that wages and hours are one of the principal subjects of the bargaining process.

We have already pointed out how necessary the activities of the employees covered by the injunction are to the manufacturing processes conducted in the building. The operation of the elevators is necessary for the delivery of incoming goods and the shipment of outgoing goods; the operation of the steam plant is necessary to heat the building, to run many of the pressing machines, and for sponging and shrinking processes. The generation of electricity is necessary to light the common portions of the building and for the operation of a large number of sewing machines. And the watchmen, the porter, and the carpenters are necessary to insure that the premises in which the manufacturing processes are conducted are properly guarded and maintained.

That these activities cannot be characterized as merely incidental to production for commerce is demonstrated by the fact that cessation of work by petitioner's employees would have an immediate and direct effect upon the manufacturing operations

conducted in the building. "Cutters and stitchers cannot work in a cold or filthy building; they must have light and power to drive their machines; they cannot be required to carry goods from one story to another." *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278, 279 (C. C. A. 2), now pending on writ of certiorari, No. 924, present Term. Without heat the building would be uninhabitable and production impossible; without steam the pressing, sponging and shrinking operations would come to a halt; without electricity sewing operations would cease, except hand sewing (*supra*, pp. 5–6). If elevator service failed, cutters, stitchers and their employers could not reach their place of work, the goods to be delivered to and taken from the building in interstate commerce could not be moved, and production would cease (*supra*, pp. 6–8). Similarly, cessation of necessary custodial, cleaning and repair activities would render the building unfit for continued production (*supra*, p. 8). The directly injurious effect upon commerce is cogently illustrated by the proof in the record, which we have already mentioned, concerning the strike of maintenance employees in New York City during 1939 (*supra*, pp. 16–17).

While stoppage of the activities of petitioner's employees would not bring about a city-wide "catastrophe" (*Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 221), it would be catastrophic for the manufacturers in petitioner's building, for in the absence of the

facilities furnished by petitioner's employees, the manufacture, sale and shipment of their product could not continue. That fact alone establishes the requisite national interest and justifies the Congressional regulation.

The same result is reached if one views the occasion for the exercise of the commerce power in this Act to be solely the need to protect interstate commerce from substandard competition. See *United States* v. *Darby Lumber Co., supra.* Since petitioner's employees, equally with those engaged in production activities for the manufacturers, are necessary to the production of the goods, those goods would move in interstate commerce as the result of substandard wages and hours if the Act were not applicable. There can be no limitation upon the power of Congress to protect interstate commerce which would exclude necessary maintenance employees yet include "production" employees. The interstate shipment results from the labor of each; the effect of substandard labor conditions is no different in either case; and the Congressional purpose to secure the prescribed labor standards for those who contribute to interstate commerce cannot have differed according as the employee is engaged in production or in other necessary work.

If the employees here involved were employed by the manufacturers, rather than by petitioner, there could be no doubt of the constitutional power to regulate their wages and hours. The National

Labor Relations Act has been consistently applied to all employees of such manufacturers and the validity of such regulation is established. Cf. *Virginia Electric Power Co.* v. *National Labor Relations Board*, 115 F (2d) 414, 415–416 (C. C. A. 4), reversed on another ground with approval of the decision below on this point, Nos. 25, 26, this Term, decided December 22, 1941; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515; *Texas & N. O. R. R. Co.* v. *Railway Clerks*, 281 U. S. 548. Certainly if the constitutional power existed while petitioner was itself occupying the entire building as a single factory, petitioner's particular arrangement for continued use of the building for production cannot be said to have vitiated the power. Cf. *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90, 92–94; *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 784 (C. C. A. 9), certiorari denied, 312 U. S. 678; compare *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278, 280 (C. C. A. 2), pending on writ of certiorari, No. 924, present Term. The activities of the employees have remained the same and it is the relation of those activities to commerce that determines the scope of the federal power.

Petitioner emphasizes that the National Labor Relations Act extends to unfair labor prac-

tices "affecting commerce" while the Fair Labor Standards Act extends to employees whose occupations are "necessary to the production." Whatever the relevance of this distinction as a matter of statutory construction (*supra*, pp. 28–30), it is immaterial to the question of the extent of the federal power. The commerce clause does not expand and contract with the terminology of particular statutes.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

CHARLES FAHY,
Solicitor General,
RICHARD H. DEMUTH,
Attorney.

WARNER W. GARDNER,
Solicitor,
IRVING J. LEVY,
Associate Solicitor,
MORTIMER B. WOLF,
Assistant Solicitor,
EDWARD J. FRUCHTMAN,
ABNER BRODIE,
NORMAN S. ALTMAN,
Attorneys,
United States Department of Labor.

APRIL 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES.

Nos. 910, 924.—October Term, 1941.

910	A. B. Kirschbaum, Petitioner, *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
924	Arsenal Building Corporation and Spear & Co., Inc., Petitioners, *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 1, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In *United States* v. *Darby*, 312 U. S. 100, and *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, the constitutionality of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, was sustained. In the cases now before us we are required to consider the scope of the Act in relation to a particular phase of industrial activity. Specifically, the problem is this: Under § 6 of the Act an employer must pay prescribed minimum wages "to each of his employees who is engaged in commerce or in the production of goods for commerce", and under § 7 overtime compensation must be given "any of his employees who is engaged in commerce or in the production of goods for commerce". Section 3(j) provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State." The employees here are engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commerce are produced. Does the Fair Labor Standards Act extend to such employees?

The facts in the two cases differ only in minor detail. In No. 910, the petitioner owns and operates a six-story loft building in Philadelphia. The tenants are, for the most part, manufacturers of men's and boys' clothing. In No. 924, the petitioners own and operate a twenty-two story building located in the heart of the New York City clothing manufacturing district. Practically all of the tenants manufacture or buy and sell ladies' garments. Concededly, in both cases the tenants of the buildings are principally engaged in the production of goods for interstate commerce. In No. 910, the petitioner employs an engineer, three firemen, three elevator operators, two watchmen, a porter, a carpenter, and a carpenter's helper. In No. 924, the controversy involves two firemen, an electrician, fourteen elevator operators, two watchmen, and six porters. These employees perform the customary duties of persons charged with the effective maintenance of a loft building. The engineer and the firemen produce heat, hot water, and steam necessary to the manufacturing operations. They keep elevators, radiators, and fire sprinkler systems in repair. The electrician maintains the system which furnishes the tenants with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carry employees, customers, salesmen, and visitors. The watchmen protect the buildings from fire and theft. The carpenters repair the halls and stairways and other parts of the buildings commonly used by the tenants. The porters keep the buildings clean and habitable.

Deeming these employees within the Act because of their relationship to the activities of the tenants, the Administrator brought suits to enjoin the petitioners from violating the Act by paying wages at lower rates than those fixed by the Act. In No. 910, the District Court granted an injunction, 38 F. Supp. 204, and the Circuit Court of Appeals for the Third Circuit affirmed. 124 F. 2d 567. In No. 924, the District Court denied an injunction, 38 F. Supp. 207, but the Circuit Court of Appeals for the Second Circuit reversed. 125 F. 2d 278. Despite this concurrence of views of the two Circuit Courts of Appeals,[1] we brought the cases here

[1] Compare Warren-Bradshaw Drilling Co. v. Hall, 124 F. 2d 42; Killingbeck v. Garment Center Capitol, Inc., 259 N. Y. App. Div. 691; Robinson v. Massachusetts Mut. Life Ins. Co., 158 S. W. 2d 441 (Tenn.); Cecil v. Gradison, 40 N. E. 2d 958 (Ohio App.); Pedersen v. Fitzgerald Construction Co., 262 N. Y. App. Div. 665.

because of the important questions presented as to the scope of the Fair Labor Standards Act. 315 U. S. —.

To search for a dependable touchstone by which to determine whether employees are "engaged in commerce or in the production of goods for commerce" is as rewarding as an attempt to square the circle. The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn under a federal enactment between what it has taken over for administration by the central Government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government.

The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration. See, *e. g.*, *Virginian Ry.* v. *Federation*, 300 U. S. 515. Thus, while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the "commerce" protected by the Sherman Law. Compare, for example, *United Leather Workers* v. *Herkert*, 265 U. S. 457, and *Levering & G. Co.* v. *Morrin*, 289 U. S. 103, with *Labor Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, and *Labor Board* v. *Fainblatt*, 306 U. S. 601. Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce. Compare *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245,

and *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, with *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the michief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated; are only local. One need refer only to the history of Congressional control over the rates of intra-state carriers which affect interstate commerce,[2] and the amendment of August 11, 1939, to the Federal Employers' Liability Act, extending the scope of that Act to employees who "shall, in any way directly or closely and substantially, affect" interstate commerce, 53 Stat. 1404. Compare *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

The Administrator does not contend that the employees in the cases before us are within the Act because Congress could have placed them there. The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have oc-

[2] For the gradual development of this extension of federal authority, see Shepard v. Northern Pac. Ry. Co., 184 Fed. 765, reversed *sub. nom.* The Minnesota Rate Cases, 230 U. S. 352; Houston & Texas Ry. v. United States, 234 U. S. 342, as applied in Ill. Cent. R. R. Co. v. Public Utilities Comm., 245 U. S. 493, and as confirmed by § 416 of the Transportation Act of 1920, 41 Stat. 456, 484, and as extended by § 13(4) of the Interstate Commerce Act. Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563.

cupied. As passed by the House, the bill applied to employers "engaged in commerce in any industry affecting commerce". See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees "engaged in commerce or in the production of goods for commerce". H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67. Moreover, in one of its intermediate stages, the measure incorporated the *Shreveport* doctrine, *Houston & Texas Ry.* v. *United States, supra,* in that it was specifically made applicable to intrastate production which competed with goods produced in another state. S. 2475, 75th Cong. 3rd Sess., as recommitted December 17, 1937, § 8(a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, *supra*, as reported April 21, 1938; see H. Rep. 2182, *supra.*

Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees "engaged in commerce or in the production of goods for commerce", construed as the provision must be in the context of the history of federal absorption of governmental authority over industrial enterprise. In this task of construction, we are without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area. Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of Congressional commercial regulatory measures and which therefore should govern their judicial construction.

We start with the weighty opinions of the two Circuit Courts of Appeals that the employees here are within the Act because they were engaged in occupations "necessary to the production" of goods for commerce by the tenants. Without light and heat and

power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity. The normal and spontaneous meaning of the language by which Congress defined in § 3(j) the class of persons within the benefits of the Act, to wit, employees engaged "in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof", encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants. The petitioners assert, however, that the building industry of which they are part is purely local in nature and that the Act does not apply where the employer is not himself engaged in an industry partaking of interstate commerce. But the provisions of the Act expressly make its application dependent upon the character of the employees' activities. And, in any event, to the extent that his employees are "engaged in commerce or in the production of goods for commerce", the employer is himself so engaged.[3] Nor can we find in the Act, as do the petitioners, any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of § 3(j) which includes employees engaged "in any process or occupation necessary to the production" and thereby does not limit the scope of the statute to the preceding clause which deals with employees "in any other manner working on such goods".

But the petitioners urge that § 3(j) cannot be construed literally, that Congress surely did not design the Act to apply to every employee who happens to perform services that are essential to the production of goods for commerce. But because some employees may not be within the Act even though their activities are in an ultimate sense "necessary" to the production of goods for commerce, it does not follow that no employees whose activities are "necessary" are entitled to the benefits of the Act. Section 3(j) cannot thus be read out of the Act. The lower court in No. 924 met the petitioners' argument by finding the Act applicable to these employees because their work was "in kind substantially the same

[3] The exact scope of the provisions of the Act dealing with the composition, authority, and procedure of advisory committees is not now before us. But, in any event, we do not find in them any limitation upon the area of regulation outlined by §§ 6 and 7.

as it would be if the manufacturers employed them directly". In the immediate situation, the answer may be adequate; but as a guiding criterion it may prove too much. "Necessary" is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority. We cannot, in construing the word "necessary", escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous relation to, and is not in any fitting sense "necessary" to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce.

We agree, however, with the conclusion of the courts below. In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce". What was said about a related problem is not inapposite here: "Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection'. In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases." *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 467. "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." *Gully* v. *First Nat. Bank*, 299 U. S. 109, 117.

A final objection to the decisions below need not detain us long. The petitioners' buildings cannot be regarded as "service establishments" within the exemption of § 13(a)(2). Selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the "greater part" of the "servicing"

done by the petitioners here is not in intrastate commerce. The suggestion that the Act, if applied to these employees, goes beyond the bounds of the commerce power is without merit. *Labor Board Cases*, 301 U. S. 1; *United States* v. *Darby*, *supra*; *Opp Cotton Mills* v. *Administrator*, *supra*.

In both cases the judgment is

Affirmed.

Mr. Justice Roberts.

I dissent. I think the power of Congress does not reach the purely local activities in question. If it did, the commerce power alone would support regulation of any local action, since it is conceivable that such activity, however remotely, "affects" commerce or is "necessary" to the production of goods for commerce.

But I am convinced that Congress never intended by the statute to reach the employees of the petitioners. Neither the words of the Act, nor its legislative history, nor the purpose to be served, requires the application of the statute in these cases.